

(21,416)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 294.

THE HANNIBAL BRIDGE COMPANY AND THE WABASH
RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF MISSOURI.

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a In the District Court of the United States, Northern Division
of the Eastern Judicial District of Missouri.

No. 314.

THE UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COM-
PANY, and THE MISSOURI PACIFIC RAILWAY COMPANY,
Defendants.

Appearances.

Henry W. Blodgett, for Plaintiff.
H. Burnham, for Hannibal Bridge Company.
Wells H. Blodgett, James L. Minnis & Geo. A. Mahan, for Wabash
Railroad Company, The Defendants.

1 UNITED STATES OF AMERICA,
*Northern Division of the Eastern
Judicial District of Missouri, ss.:*

In the District Court of the United States in and for The Northern
Division of said District.

Be it remembered, That on the Fourth day of June, A. D. 1907,
the following among other proceedings were had, and appear of
record in said Court, to-wit:

314.

THE UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COM-
PANY, and THE MISSOURI PACIFIC RAILWAY COMPANY,
Defendants.

Now, at this day comes the United States by District Attorney,
and moves the Court for an order, for leave to file Information
against The Hannibal Bridge Company, The Wabash Railroad
Company and the Missouri Pacific Railway Company, the defend-
ants herein. Upon due consideration, it is ordered by the Court
that such leave be granted. And now, comes said District Attorney
and files Information against said Defendants, endorsed, to-wit:
No. 314. In the United States District Court N. Div. E. Dist. of
Mo. United States, vs. The Hannibal Bridge Co., The Wabash Rail-
road Company and the Missouri Pacific Railway Co. Criminal
Information. Violation of Act of March 3, 1899. (30 stat. L.
1153.) Filed June 4, 1907, in open Court. Geo. C. Moore, Clerk.

Which said Information, is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,

Eastern District of Missouri Northern Division.

In the District Court of the United States within and for the Division and District aforesaid, at the May Term of said Court, in the year of our Lord One Thousand Nine Hundred and Seven.

Henry W. Blodgett, Attorney of the United States, for the Eastern District of Missouri, who in this behalf prosecutes in the name of the United States, and for the United States, comes here into said Court on the 4th day of June, in the year of our Lord One Thousand Nine Hundred and Seven, in his own proper person, and for the United States, and states upon his oath and to the best of his information and belief, and gives the Court here to understand and be informed; that the Hannibal Bridge Company, the Wabash Railroad Company and the Missouri Pacific Railway Company, are, each of them, corporations organized under and existing by virtue of the laws of the State of Missouri, and that each of said Companies has been such a corporation continuously and without interruption for the period of time extending from the first day of May, in the year of our Lord One Thousand Nine Hundred and Five to the first day of May in the year of our Lord One Thousand Nine Hundred and Seven, and is now such corporation; that heretofore, to-wit, on the first day of May, in the year of our Lord One Thousand Nine Hundred and Five, at the County of Marion, in the Division and District aforesaid, and within the jurisdiction of this Court, the aforesaid corporations owned and controlled a railroad bridge, commonly called the "Hannibal" or "Wabash" Bridge, over the Mississippi River, extending from the West or Missouri bank, in the said County of Marion, to the East, or Illinois bank of said River, said Mississippi River being then and there and at all times herein mentioned, a navigable waterway of the United States; that the aforesaid corporations have continuously owned and controlled said railroad bridge at said place, over said navigable water-way, from said first day of May in the year of our Lord One Thousand Nine Hundred and Five, up to the first day of May in the year of our Lord One Thousand Nine Hundred and Seven.

That said railroad bridge was constructed under and by virtue of, and subject to, and authorized by an act of Congress known as the Act of July 25th, 1866: "An Act to authorize the construction of certain bridges and to establish them as post Roads;" wherein and whereby it is provided as follows, to-wit: "That if any bridge built under this Act shall be constructed as a draw-bridge, the same shall be constructed as a pivot draw-bridge, with a draw over the main channel of the river at an accessible and navigable point and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw"—that said railroad bridge is and was at all times herein mentioned a pivot draw bridge, and as such has during all said time been an illegal and unlawful structure and an illegal and unlawful obstruction to navigation upon said river at said place in this, to-wit: that the

spans of said bridge have been during all said time less than one hundred and sixty feet in the clear on each side of the central or pivot pier of the draw of said bridge.

That, to-wit: on the first day of May, in the year of our Lord One Thousand Nine Hundred and Five, the Secretary of War, having good reason to believe, and believing, that said railroad
3 bridge constructed and located as aforesaid, was an unreasonable obstruction to the free navigation of said Mississippi River, which in fact was and is true, in this, to-wit: on account of the unsuitable location of the draw-spans and protection cribs; the lack of suitable guard fences or sheer booms; and the presence of obstructing riprap around the piers of said bridge, and that there was difficulty in passing the draw openings or draw-spans of such bridge by rafts, steamboats or other water-crafts, caused a notice to be served upon each of the herein defendant corporations, notifying each of them as the owners and controllers of said railroad bridge, that it was proposed to require certain changes, to-wit: the changes enumerated and set forth in the notice contained herein, and set forth immediately below, to be made in said bridge, and that each of the herein defendant corporations would be given a reasonable opportunity to be heard in the matter.

Each of said notices, omitting the name of the person or corporation to whom the same was directed, was in substance and to the effect, as follows, to-wit:

"Whereas, the Secretary of War has good reason to believe that the bridge over the Mississippi River at Hannibal, Mo., commonly known as the Wabash Railway Bridge, is an unreasonable obstruction to the free navigation of the Mississippi River, on account of unsuitable location of the draw-spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers. It is proposed to require the following changes to be made in said bridge by the first day of July, 1906, to-wit: As per attached slip:

"The West draw-pier—(first pier from Missouri shore) to be converted into a pivot-pier; a new West draw-rest pier—to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot pier; and proper guard fences to be built along the Missouri shore above and below the new shore-pier.

Each of the draw-openings on the new location of draw-span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

The new and remodeled piers to be constructed as not to necessitate the use of rip-rap or either protection around their base, and as large a waterway as possible to be given between all new and remodeled piers.

In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, in Room 28, at U. S.

Engineer Office, Post Office Bldg., 16th St. and 2nd Ave., in Rock Island, Ill., at 10 o'clock A. M. on the Sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War.

C. S. RICHE,

Major, Corps of Engineers."

4 That thereafter, to-wit: on the 10th of March, in the year of our Lord One Thousand Nine Hundred and Six, each of the defendant corporations herein, at said time having had a reasonable opportunity to be heard on said proposed certain changes in said bridge, the Secretary of War gave notice to each of the defendant corporations herein, as the corporations owning and controlling the aforesaid railroad bridge, to alter the same so as to render navigation through or under it reasonably free, easy and unobstructed, and that in said notice the Secretary of War specified the changes recommended by the Chief of Engineers that were required to be made, to-wit: the changes enumerated and set forth in the notice contained herein and set forth immediately below, and therein said notice prescribed a reasonable time in which to make said specified changes recommended as aforesaid, which said reasonable time in which to make said specified changes recommended as aforesaid, was the period of time from the date of giving said notice up to and which expired on the fifteenth day of March, in the year of our Lord one thousand nine hundred and seven.

That the Secretary of War gave said notice to alter said bridge as aforesaid, to said defendant corporations, as the corporations owning and controlling said bridge, by serving upon each of said corporations a copy of a notice, which said notice, omitting the name of the person or corporation to whom the same was directed, was in substance and to the effect as follows, to-wit:

"Take notice that:—

Whereas, the Secretary of War has good reason to believe that the drawbridge, commonly known as the Wabash Railway Bridge, owned or operated by the Hannibal Bridge Company, *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable water-ways of the United States) on account of unsuitable location of the draw-spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers; there being difficulty in passing the draw-openings or draw-spans of such bridge by rafts, steam boats or other water craft.

And, whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy and unobstructed, to-wit:

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot pier; a new west draw-rest pier to be constructed near the Missouri shore;—the present pivot pier to be cut

down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work, to be built above and below the new pivot pier; the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw-openings on the new location of draw-span to give at all stages of the river a clear width of water-way of not less than one hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

5 (c) The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their bases, and as large a water-way as possible to be given between all new and remodeled piers;

And, whereas, To March 15th, 1907, is a reasonable time in which to alter the said bridge as described above.

Now, therefore, In obedience to, and by virtue of, section eighteen of an Act of the Congress of the United States entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899 (30 Stat. L. 1153), the Secretary of War hereby notifies the said Hannibal Bridge Company, the Wabash Railroad Company and the Missouri Pacific Railway Company, to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15th, 1907.

ROBERT SHAW OLIVER,

Asst Secretary of War."

That after the expiration of such reasonable time, prescribed as aforesaid, in which to make said specified changes in said railroad bridge, recommended as aforesaid, that is, to-wit, upon the 16th day of March in the year of our Lord One Thousand Nine Hundred and Seven, the aforesaid alterations and changes in said Railroad Bridge recommended and specified as aforesaid, had not been made by the herein defendant corporations or any of them; but on the contrary each of said corporations owning and controlling said railroad bridge after receiving the aforesaid notice from the Secretary of War, to make said alterations and changes in said railroad bridge, specified and recommended as aforesaid, within the reasonable time prescribed by the Secretary of War, as aforesaid, did, unlawfully and willfully fail and refuse to make said alterations and changes in said railroad bridge specified and recommended as aforesaid, within the reasonable time prescribed by the Secretary of War, as aforesaid, and that each of the said defendant corporations did therein and thereby unlawfully and willfully fail and refuse to comply with the lawful order of the Secretary of War in the premises, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States.

Wherefore, said Attorney, in behalf of the United States, prays the consideration of the Court herein the premises, and that due

process of law may be awarded against the said Hannibal Bridge Company, the Wabash Railroad Company, and the Missouri Pacific Railway Company in this behalf.

Second Count.

In the District Court of the United States, within and for the Division and District aforesaid, at the May Term of said Court, in the Year of Our Lord One Thousand Nine Hundred and Seven.

Henry W. Blodgett, Attorney of the United States, for the Eastern District of Missouri, who in this behalf prosecutes in the name of the United States, and for the United States, comes hereinto this Court on this 4th day of June, in the year of our Lord One
6 Thousand Nine Hundred and Seven, in his own proper person, and for the United States, and further states upon his oath and to the best of his information and belief, and gives the Court here to understand and be informed; that the Hannibal Bridge Company, the Wabash Railroad Company and the Missouri Pacific Railway Company, are, each of them, corporations organized under and existing by virtue of the laws of the State of Missouri, and that each of said companies has been such a corporation continuously and without interruption for the period of time extending from the first day of May, in the year of our Lord One Thousand Nine Hundred and Five to the first day of May in the year of our Lord One Thousand Nine Hundred and Seven, and is now such corporation; that heretofore, to-wit, on the first day of May, in the year of our Lord One Thousand Nine Hundred and Five, at the County of Marion, in the Division and District aforesaid, and within the jurisdiction of this Court, the aforesaid corporations owned and controlled a railroad bridge, commonly called the "Hannibal" or "Wabash" Bridge, over the Mississippi River, extending from the West or Missouri Bank, in the said County of Marion, to the East or Illinois bank of said River, said Mississippi River being then and there and at all times herein mentioned, a navigable waterway of the United States; that the aforesaid corporations have continuously owned and controlled said railroad bridge at said place, over said navigable waterway from said first day of May in the year of our Lord One Thousand Nine Hundred and Five, up to the first day of May in the year of our Lord One Thousand and Nine Hundred and Seven.

That said Railroad Bridge was constructed under, by virtue of, and subject to, and authorized by an Act of Congress known as the Act of July 25, 1866, "An Act to authorize the construction of certain bridges and to establish them as Post Roads"; wherein and whereby it is provided as follows, to-wit, "That if any bridge built under this Act shall be constructed as a draw-bridge, the same shall be constructed as a pivot draw-bridge, with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty (160) feet in length in the clear on each side of the central or pivot pier of the draw";—

that said railroad bridge is and at all times herein mentioned was, a pivot draw bridge, and as such has during all said time been an illegal and unlawful structure and an illegal and unlawful obstruction to navigation upon said River at said place in this, to-wit; that the spans of said bridge have been during all said time less than one hundred and sixty feet in the clear on each side of the central or pivot pier of the draw of said bridge.

That, to-wit: on the first day of May, in the year of our Lord One Thousand Nine Hundred and Five, the Secretary of War, having good reason to believe, and believing, that said railroad bridge constructed and located as aforesaid, was an unreasonable obstruction to the free navigation of said Mississippi River, which in fact was and is true, in this, to-wit: on account of the unsuitable location of the draw-spans and protection cribs; the lack of suitable guard fences or sheer booms; and the presence of obstructing rip-rap around the piers of said bridge, and that there was difficulty in passing the draw openings or draw-spans of such bridge by rafts, steamboats or other watercraft, caused a notice to be served

7 upon each of the herein defendant corporations, notifying each of them as the owners and controllers of said railroad bridge, that it was proposed to require certain changes, to-wit: the changes enumerated and set forth in the notice contained herein, and set forth immediately below, to be made in said bridge, and that each of the herein defendant corporations would be given a reasonable opportunity to be heard in the matter.

Each of said notices, omitting the name of the person or corporations to whom the same was directed, was in substance and to the effect as follows, to-wit:

"Wherefore, the Secretary of War has a good reason to believe that the bridge over the Mississippi River at Hannibal, Mo., commonly known as the Wabash Railway Bridge, is an unreasonable obstruction to the free navigation of the Mississippi River, on account of unsuitable location of the drawspans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers. It is proposed to require the following changes to be made in said bridge by the first day of July 1906, to-wit: As per attached slip.

"The West draw-pier (first pier from Missouri shore) to be converted into a pivot-pier; a new West drawrest-pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot-pier; and proper guard-fences to be built along the Missouri shore above and below the new shore pier.

"Each of the draw-openings on the new location of draw-span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

"The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers."

In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, in room 28, at U. S. Engineer Office, Post Office Bldg., 16th St. and 2nd Ave. in Rock Island, Ill. at 10 o'clock A. M. on the Sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision, it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War:

C. S. RICHE,
Major, Corps of Engineers."

That thereafter, to-wit: on the 10th day of March in the year of our Lord One Thousand Nine Hundred and Six, each of the defendant corporations, herein, at said time having had a reasonable opportunity to be heard on said proposed certain changes in said bridge, the Secretary of War gave notice to each of the defendant corporations herein, as the corporation owning and controlling the aforesaid railroad bridge, to alter the same so as to render navigation through or under it reasonably free, easy and unobstructed, and that in said notice the Secretary of War specified the changes recommended by the Chief of Engineers that were required to be

made, to-wit: the changes enumerated and set forth in the
8 notice contained herein and set forth immediately below, and therein said notice prescribed a reasonable time in which to make said specified changes recommended as aforesaid, which said reasonable time in which to make said specified changes recommended as aforesaid, was the period of time from the date of giving said notice up to and which expired on the fifteenth day of March, in the year of our Lord One Thousand Nine Hundred and Seven.

That the Secretary of War gave said notice to alter said bridge as aforesaid, to said defendant corporations, as the corporations owning and controlling said bridge, by serving upon each of said corporations a copy of a notice, which said notice, omitting the name of the person or corporation to whom the same was directed, was in substance and to the effect as follows; to-wit:

"Take Notice That

Whereas, the Secretary of War has good reason to believe that the drawbridge commonly known as the Wabash Railway bridge, owned or operated by the Hannibal Bridge Company, *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation to the said Mississippi River (which is one of the navigable waterways of the United States) on account of unsuitable location of the draw-span and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers; there being difficulty in passing the draw-openings or draw-spans of such bridge by rafts, steamboats, or other watercraft;

And, whereas, the following alterations which have been recom-

mended by the Chief of Engineers, are required to render navigation through it reasonably free, easy and unobstructed, to-wit:

(a) The West draw-rest pier (first pier from Missouri shore) to be converted into a pivot-pier; a new West draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an East draw-rest pier; the present draw-span to be moved West; new and solid long or protection piers of crib work, to be built above and below the new pivot-pier; the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw openings on the new locations of draw-span to give at all stages of the river a clear width of waterway of not less than one hundred and Sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers;

And, whereas, To March 15th, 1907, is a reasonable time in which to alter the said bridge as described above;

Now, therefore, In obedience to, and by virtue of, Section eighteen of an Act of the Congress of the United States entitled 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes' approved March 3rd, 1899, (30 Stat. L. 1153), the Secretary of War hereby notifies the said Hannibal Bridge Company, the Wabash Railroad Company, and the Missouri Pacific Railway Company, to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15th, 1907.

ROBERT SHAW OLIVER,

Asst Secretary of War.

9 That after the expiration of the period of one month after the expiration of such reasonable time prescribed as aforesaid, in which to make said specified changes in said Railroad bridge, recommended as aforesaid, that is, to-wit: upon the first day of May in the year of our Lord One Thousand Nine Hundred and Seven, the aforesaid alterations and changes in said Railroad bridge recommended and specified as aforesaid, had not been made by the herein defendant corporations, or any of them; but on the contrary each of said corporations owning and controlling said Railroad bridge after receiving the aforesaid notice from the Secretary of War, to make said alterations and changes in said Railroad bridge, specified and recommended as aforesaid, within the reasonable time prescribed by the Secretary of War, as aforesaid, did, unlawfully and willfully fail and refuse to make said alterations and changes in said Railroad bridge specified and recommended as aforesaid, for the period of one month after the expiration of the reasonable time prescribed by the Secretary of War, as aforesaid, and that each of the said defendant corporations did therein and thereby un-

lawfully and wilfully fail and refuse to comply with the lawful order of the Secretary of War in the premises, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States.

Wherefore, said Attorney, in behalf of the United States, prays the consideration of the Court here in the premises, and that due process of law may be awarded against the said Hannibal Bridge Company, the Wabash Railroad Company, and the Missouri Pacific Railway Company in this behalf.

HENRY W. BLODGETT,
*United States Attorney for the
Eastern District of Missouri.*

Subscribed and sworn to before the undersigned on this 15th day of May in the year of our Lord One Thousand Nine Hundred and Seven.

[SEAL.]

W. W. NALL,
*Clerk of the District Court of the United States for
the Eastern Division, Eastern District, of Missouri.*

Endorsed: No. 314. In the United States District Court N. Div., E. Dist. of Mo. United States *vs.* The Hannibal Bridge Co., The Wabash Railroad Company and the Missouri Pacific Railway Co. Criminal Information. Violation of Act of March 3, 1899. (30 Stat. L. 1153). Filed June 4, 1907 in open Court. Geo. C. Moore, Clerk.

Afterwards, to-wit: on the 4th day of June, A. D. 1907, the following among other proceedings were had and appear of record in said Court: to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE CO., THE WABASH RAILROAD CO., and THE MISSOURI PACIFIC RAILWAY CO., Defendants.

At this day comes the United States by District Attorney,
10 and moves the Court for an Order for the issuing of a Summons herein. Upon due consideration thereof it is ordered by the Court that a Summons issue for each of the defendants, to-wit: The Hannibal Bridge Company, The Wabash Railroad Company and The Missouri Pacific Railway Company, returnable at this Court on The First Monday in December, 1907.

Afterwards, to-wit: On the 4th day of June, A. D. 1907, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY, and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Now at this day it is ordered by the Court that this cause be continued until the next term of this Court.

Afterwards, to-wit: on the 12th day of June, A. D. 1907, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

THE UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY, THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Now at this day Summons issued for each of the above named defendants in accordance with the order heretofore entered, returnable to the next term of this Court.

Which said Summons for The Hannibal Bridge Company, a corporation, is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,

*Northern Division of the Eastern**Judicial District of Missouri, set:*

In the District Court of the United States in and for the Northern Division of said District.

The President of the United States of America to the Marshal of the United States in and for said District, Greeting:

11 You are hereby commanded to summon the Hannibal Bridge Company, a corporation, citizen of the State of Missouri, that it be and appear before the Honorable District Court of the United States in and for the Northern Division of the Eastern Judicial District of Missouri, on the first day of the next term thereof, to be holden at the City of Hannibal in and for the Northern Division of said District, on the first Monday of December next, then and there to answer to an Information filed against it by the United States, for a violation of the Act of March 3rd, 1899, (30 Statutes at Large 1153), as set forth in the Information filed in said Court on the Fourth day of June A. D. Nineteen hundred and seven.

Hereof fail not, and have you then and there this writ.

Witness, the Honorable David P. Dyer, Judge of the District

Court of the United States, for the Northern Division of the Eastern District of Missouri, the 12th day of June A. D. nineteen hundred and seven.

Issued at office, in the City of Hannibal, under the seal of said District Court, the day and year last aforesaid.

[SEAL.]

GEO. C. MOORE, *Clerk*,

By ———, *Deputy*.

Endorsed: No. 314. United States District Court, Northern Division of the Eastern Judicial District of Missouri. The United States, *vs.* The Hannibal Bridge Company, *et al.* Summons. Issued 12 day of June A. D. 1907. Ret'ble 2, day of Dec. A. D. 1907. Returned into Court and filed 1st day of July A. D. 1907. Geo. C. Moore, Clerk.

Afterwards, to-wit: on the same day there was issued a Summons for The Wabash Railroad Company, a corporation, in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,

Northern Division of the Eastern

Judicial District of Missouri, set:

In the District Court of the United States in and for the Northern Division of said District.

The President of the United States of America to the Marshal of the United States in and for said District, Greeting:

You are hereby commanded to summon The Wabash Railroad Company, a corporation, citizen of the State of Missouri, that it be and appear before the Honorable District Court of the United States in and for the Northern Division of the Eastern Judicial District of Missouri, on the first day of the next term thereof, to be

holden at the City of Hannibal in and for the Northern
12 Division of said District, on the First Monday of December next, then and there to answer to an Information filed against it by the United States, for a violation of the Act of March 3rd 1899, (30 Statutes at large 1153), as set forth in the Information filed in said Court on the Fourth day of June A. D. nineteen hundred and seven.

Hereof fail not, and have you then and there this writ.

Witness, the Honorable David P. Dyer, Judge of the District Court of the United States, for the Northern Division of the Eastern District of Missouri, the 12th day of June, A. D. nineteen hundred and seven.

Issued at office in the city of Hannibal, under the seal of said District Court, the day and the year last aforesaid.

[SEAL.]

GEO. C. MOORE, *Clerk*,

By ———, *Deputy*.

Endorsed: No. 314. United States District Court, Northern Division of the Eastern Judicial District of Missouri. The United States *vs.* The Wabash Railroad Company, *et al.* Summons. Issued 12 day of June A. D. 1907. Ret'ble 2 day of Dec. A. D. 1907. Returned into Court and filed 11th day of July A. D. 1907. Geo. C. Moore, Clerk.

Afterwards, to-wit: on the same day there was issued a Summons for The Missouri Pacific Railway Company, a corporation, in words and figures as follows, to-wit:

THE UNITED STATES OF AMERICA,

*Northern Division of the Eastern
Judicial District of Missouri, set:*

In the District Court of the United States in and for the Northern Division of said District.

The President of the United States of America to the Marshal of the United States in and for said District, Greeting:

You are hereby commanded to summon The Missouri Pacific Railway Company, a corporation, citizen of the State of Missouri, that it be and appear before the Honorable District Court of the United States in and for the Northern Division of the Eastern Judicial District of Missouri, on the first day of the next term thereof, to be holden at the City of Hannibal in and for the Northern Division of said District, on the First Monday of December next, then and there to answer to Information filed against it by the United States, for violation of the Act of March 3rd 1899, (30 Statutes at large 1153), as set forth in the Information filed in said Court on the Fourth day of June A. D. nineteen hundred and seven.

Hereof fail not and have you then and there this writ.

Witness, the Honorable David P. Dyer, Judge of the District Court of the United States, for the Northern Division of the Eastern District of Missouri, the 12th day of June A. D. nineteen hundred and seven.

Issued at office, in the City of Hannibal, under the seal of said District Court, the day and year last aforesaid.

[SEAL.]

GEO. C. MOORE, *Clerk*,
By ———, *Deputy*.

Endorsed: No. 314. United States District Court, Northern Division of the Eastern Judicial District of Missouri. The United States *vs.* The Missouri Pacific Railway Company, *et al.* Summons. Issued 12 day of June A. D. 1907. Ret'ble 2 day of Dec. A. D. 1907. Returned into Court and filed 11th day of July A. D. 1907. Geo. C. Moore, Clerk.

Afterwards, to-wit: on the 1st day of July, A. D. 1907, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

THE UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY ET AL., Defendants.

Now at this day comes the United States Marshal and returns into Court and files the original Summons issued against defendant. The Hannibal Bridge Company, with his return of service endorsed thereon, to-wit:

"I hereby certify that I have executed this writ in the City of Hannibal Mo. in the above named District on the 28th day of June A. D. 1907 by delivering a true copy thereof as certified by the Clerk to A. R. Levering, Agent of the Within named defendant corporation the Hannibal Bridge Company, and who was in the business office of said defendant and had charge thereof at the time of service, the President or other higher chief officer not being found in the Eastern District of Missouri at the time of service.

WM. L. MORSEY,

*U. S. Marshal,*By J. P. O'HERN, *Deputy.*

Afterwards, to-wit: on the 11th day of July, A. D. 1907, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

THE UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY ET AL., Defendants.

Now at this day comes the United States Marshal and returns into Court and files the original Summons issued against defendant. The Missouri Pacific Railway Company, with his return of service endorsed thereon, to-wit:

"UNITED STATES OF AMERICA,

*Eastern Division of the Eastern**Judicial District of Missouri, ss:*

14 I certify that I have executed this writ at the City of St. Louis in the above named District on the 9th day of July A. D. 1907 by delivering a true copy thereof as certified by the Clerk to M. C. Markham, Assistant to Vice President of the within named defendant, the Missouri Pacific Railway Company, a corporation and who was in the business office of said Defendant and had charge thereof at the time of said service, the President or other higher chief officer not being found in the Eastern District of Missouri at the time of service.

WM. L. MORSEY,

United States Marshal."

Afterwards, to-wit: on the same day the following among other proceedings were had and appear of record in said Court, to-wit:

314.

THE UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY ET AL., Defendants.

Now at this day comes the United States Marshal and returns into Court and files the original Summons issued against defendant The Wabash Railroad Company with his return of service endorsed thereon, to-wit:

"UNITED STATES OF AMERICA,

Eastern Division of the Eastern

Judicial District of Missouri, ss:

I certify that I have executed this writ at the City of St. Louis in the above named District on the 9th day of July 1907 by delivering a true copy thereof as certified by the Clerk to E. B. Pryor, vice President of the within named defendant corporation the Wabash Railroad Company, and who was in the business office of said Defendant or other higher chief officer not being found in the Eastern District of Missouri at the time of service.

WM. L. MORSEY,

United States Marshal."

Afterwards, to-wit: on the 3rd day of December A. D. 1907, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE CO., THE WABASH RAILROAD COMPANY
and MISSOURI PACIFIC RAILWAY CO., Defendants.

Criminal Information, Violation Act March 3, 1899, (30 Stat.
L1153)

Now at this day comes the United States by District Attorney and also come the defendants herein by Geo. A. Mahan, their attorney and counsel and now by consent of said parties, it is ordered by the Court that this cause be continued until the next term of this Court.

Afterwards, to-wit: on the 22nd day of May, A. D. 1908, the following among other proceedings were had and appear of record in said Court, to-wit:

UNITED STATES, Plaintiff,

vs.

HANNIBAL BRIDGE COMPANY ET AL., Defendants.

Now at this day comes the United States Marshal of Iowa and files Subpoena issued herein, with his return of service endorsed thereon, to-wit: This writ came into my hands for service on the 21st day of May 1908 and I served the same upon John Killeen (reading waived) at Dubuque, Iowa, on the 21st day of May 1908 and delivered to him a copy of this writ.

EDWARD KNOTT, *U. S. Marshal,*

By ———— *Deputy.*

Afterwards, to-wit: on the 25th day of May, A. D. 1908, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY, and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Now at this day come the defendants by their Attorneys and by leave of Court file Demurrer to the Information herein.

Which said Demurrer is in words and figures as follows, to-wit:

In the District Court of the United States for the Northern Division of the Eastern Judicial District of Missouri, May Term, 1908.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Demurrer of Hannibal Bridge Company and Wabash Railroad Company and the Missouri Pacific Railway Company to Information.

And now comes the Hannibal Bridge Company and the Wabash Railroad Company and The Missouri Pacific Railway Company, into Court, and having heard the said information herein read, say that said information and both counts thereof and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that they, the said Hannibal Bridge Company and the Wabash Railroad Company, and the

Missouri Pacific Railway Company, are not bound by the law of the land to answer the same, and this the Hannibal Bridge Company and the Wabash Railroad Company and the Missouri Pacific Railway Company are ready to verify, for the following reasons to wit:

16 1st. Because it appears on the face of the information that the Secretary of War did not give notice to the defendants or either of them to alter the bridge.

2nd. Because failure or refusal to comply with a notice to alter the bridge given by the Assistant Secretary of War, is the only failure or refusal charged against the defendants, and such failure or refusal does not constitute an offense under the statute.

3rd. Because said information is insufficient and bad for repugnancy in its material allegation in this, to-wit: That the allegation that the Secretary of War gave the defendants notice to alter said bridge is repugnant to and inconsistent with the subsequent allegation that the notice given to the defendants was in substance the same as the paper writing set forth in said information, signed "Robert Shaw Oliver, Assistant Secretary of War."

4th. Because the alleged notice set forth in the information does not specify the changes that are required to be made in the bridge with such particularity as to enable the defendants to comply therewith in this, to-wit: That said alleged notice states that "new and solid long or protection piers of crib-work shall be built above and below the (proposed) new pivot-pier," but does not specify or inform the defendants as to the length of the new and solid long or protection piers they are required to build, above or below said new pivot pier, in order to comply with said pretended notice.

5th. Because said alleged or pretended notice requires that "proper guard fences be built along the Missouri shore above and below the (proposed) new shore pier," but does not specify or inform the defendants as to the length of the guard fences to be constructed along the Missouri shore by them or the kind of material of which said guard fences are to be constructed.

6th. Because the notice to defendants to alter the bridge, set out in the information, did not specify the changes to be made as required by statute.

Wherefore for want of sufficient information in this behalf, the said Hannibal Bridge Company and the Wabash Railroad Company and The Missouri Pacific Railway Company, pray judgment, and that by the Court they may be dismissed and discharged from the said premises in the said information specified, and all the counts thereof.

R. BURNHAM MOFFAT,
WELLS H. BLODGETT,
JAMES L. MINNIS, &
GEO. A. MAHAN,

*Attorneys for Hannibal Bridge Company and
Wabash Railroad Company.*

MARVIN L. CLARDY AND
HENRY G. HERBEL

Attys. for The Mo. Pac. Ry. Co.

Endorsed: United States District Court, Northern Division, Eastern Judicial District of Missouri. No. 314. United States, Plaintiff vs. Hannibal Bridge Company, *et al.* Defendants Demurrer to Information. Filed 25th day of May 1908. Geo. C. Moore, Clerk.

17 Afterwards, to-wit: on the 26th day of May, A. D. 1908, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Now at this day comes the United States, by District Attorney, and also come the defendants herein, by their Attorneys, and this cause coming on to be heard, upon the defendants' Demurrer to the Information filed herein the same is submitted to the Court upon the arguments of counsel. And now the Court desiring to further consider the matter takes the demurrer under advisement.

Afterwards, to-wit: on the 27th day of May, A. D. 1908, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY, and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Now at this day comes the United States, by District Attorney, and also come the defendants herein by their Attorneys and counsel, and the Demurrer heretofore submitted coming on to be heard, and the Court having duly considered the same and being now fully advised in the premises, doth order that said Demurrer be, and the same is hereby overruled.

Afterwards, to-wit: on the 28th day of May, A. D. 1908, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY, and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Criminal Information. Violation of Act of March 3, 1899 (30 Stat. L., 1153).

Now at this day comes the United States, by District Attorney, and also comes the defendant, The Hannibal Bridge Company, by its attorneys and counsel. And now upon Motion of the District Attorney, said defendant Hannibal Bridge Company is called for arraignment upon the Information returned and filed herein. And now said defendant being duly arraigned, waives the reading of the Information, and says it is not guilty in manner and form as charged in the Information.

18 Afterwards, to-wit: on the same day the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY, and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Criminal Information. Violation of Act of March 3, 1899 (30 Stat. L., 1153).

Now at this day comes the United States, by District Attorney, and also comes the defendant The Wabash Railroad Company, by its attorneys and counsel. And now upon motion of the District Attorney said defendant The Wabash Railroad Company is called for arraignment upon the Information returned and filed herein; And now, said defendant being duly arraigned waives the reading of the Information, and says it is not guilty in manner and form as charged in the information.

Afterwards, to-wit: on the same day the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY, and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Criminal Information. Violation of Act of March 3, 1899 (30 Stat. L., 1153).

Now at this day comes the United States by District Attorney, and also comes the defendants The Missouri Pacific Railway Company, by its attorneys and counsel. And now upon motion of the District Attorney, said defendant The Missouri Pacific Railway Company is called for arraignment upon the Information returned and filed herein. And now said defendant being duly arraigned waives the reading of the Information, and says it is not guilty in manner and form as charged in the Information.

Afterwards, to-wit: on the same day the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY, and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Criminal Information. Violation of Act of March 3, 1899 (30th Stat. L., 1153).

Now at this day comes the United States, by District Attorney, and also come the defendants herein by their respective Attorneys and counsel, and this cause coming on to be heard and both parties answering ready for trial, there come the following Jurors of a Jury, to-wit: Clyde Richards, Roy McFarland, Fallie T. Smith, B. P. Rutledge, Joe Parrish, Chas. F. Glascock, W. H. Barger, C. F. Afflick, Wm. Alderton, C. H. Magruder, Samuel S. Hiller, and Emmett Bradshaw, Twelve good and lawful men of the body of the Northern Division of the Eastern Judicial District of Missouri, duly elected, tried, sworn and impaneled to try the issues herein joined.

And said Jurors having heard all the testimony adduced on behalf of the Plaintiff; Plaintiff rests, thereupon the defendants file Demurrer to the evidence. Which said Demurrer is by the Court overruled. And now the testimony on behalf of the defendants is heard.

And now said Jurors having heard all the testimony, the argu-

ments of Counsel, and receiving the instructions of the Court, this cause is submitted, and said Jurors retire to their room to consider of their verdict.

Afterwards, to-wit: On the same day said Jurors return into Court, and severally answer to their presence, and through their foreman return the following verdict:

"We the Jury find the defendants The Hannibal Bridge Company, and The Wabash Railroad Company, Guilty as charged in the Information.

C. F. AFFLICK, *Foreman*.

We the Jury by direction of the Court find the defendant The Missouri Pacific Railway Company not guilty.

C. F. AFFLICK, *Foreman*."

Thereupon said verdict is ordered filed, and said Jurors are discharged of their duties in said cause.

Afterwards, to-wit: on the same day the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY, and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Now at this day comes the United States, by District Attorney, and also comes the defendant The Missouri Pacific Railway Company, by its attorneys and counsel, and the said defendant moves the Court that it be discharged upon the verdict rendered by the Jury. Thereupon,

It is considered, ordered and adjudged by the Court, that the said defendant, The Missouri Pacific Railway Company, be and is hereby discharged and that the United States take nothing by its writ against said defendant.

Afterwards, to-wit: on the 29th day of May, A. D. 1908, the following among other proceedings were had and appear of record in said Court, to-wit:

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD
COMPANY, Defendants.

Criminal Information. Violation of Act March 3, 1899 (30th
Stat. L., 1153).

This day comes the United States, by District Attorney, and the said defendant The Hannibal Bridge Company, being present in Court by its attorneys and counsel, the said District Attorney asks the judgment and sentence of the Court upon the said defendant The Hannibal Bridge Company, upon the verdict of the jury returned, filed and entered herein, and the said defendant The Hannibal Bridge Company, having nothing further to say after demand made of it why such judgment and sentence should not be rendered:

It is, therefore, now considered by the Court, and as the judgment and sentence of the Court upon the said The Hannibal Bridge Company, upon the verdict so rendered as aforesaid, that it the said defendant The Hannibal Bridge Company, make its fine to the United States of America, by the payment of the sum of (\$5000.00) Five Thousand Dollars, that is to say, \$2500.00 on the first count and \$2500.00 on the second Count of said Information, and also the costs of the prosecution of this cause, to be taxed, and that hereof execution may issue therefor.

Afterwards, to-wit: on the same day the following among other proceedings were had and appear of record in said Court, to-wit:

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD
COMPANY, Defendants.

Criminal Information. Violation of Act March 3, 1899 (30th
Stat. L., 1153).

This day comes the United States, by District Attorney, and the said defendant The Wabash Railroad Company, being present in Court by its attorneys and counsel, the said District Attorney, asks the judgment and sentence of the Court upon the said defendant, The Wabash Railroad Company, upon the verdict of the jury, returned, filed and entered herein, and the said defendant The Wabash Railroad Company, having nothing further to say after demand made of it why such judgment and sentence should not be rendered:

It is, therefore, now considered by the Court, and as the judgment

and sentence of the Court upon the said The Wabash Railroad Company, upon the verdict so rendered as aforesaid, that it the said defendant The Wabash Railroad Company, make its fine to the United States of America by the payment of the sum of (\$5000.00) Five Thousand Dollars, that is to say \$2500.00 on the first count and \$2500.00 on the second count of said Information, and also the costs of the prosecution of this cause, to be taxed, and that hereof execution may issue therefor.

21 Afterwards, to-wit: on the same day, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD COMPANY, Defendants.

Now at this day come the defendants herein, by their attorneys and counsel, and file motion for a new trial.

Which said Motion for a New Trial is in words and figures, as follows, to-wit:

In the District Court of the United States for the Northern Division of the Eastern Judicial District of Missouri, May Term, 1908.

UNITED STATES, Plaintiff,

vs.

HANNIBAL BRIDGE COMPANY and WABASH RAILROAD COMPANY, Defendants.

Motion for New Trial.

Defendants move the Court to set aside the verdicts herein and grant a new trial herein:

1. Because the Court admitted any testimony offered by the United States.
2. Because the Court admitted illegal and improper testimony offered by the United States.
3. Because the Court excluded legal and proper testimony offered by defendants.
4. Because the Court, of its own motion, gave to the jury illegal and improper instructions, and illegal and improper declarations of law.
5. Because the Court, at the instance of the United States, gave to the jury illegal and improper instructions and illegal and improper declarations of law.
6. Because the Court refused to give proper and legal instructions and proper and legal declarations of law asked by defendants.

7. Because the Court erred in the admission and rejection of testimony and in the giving and refusal of instructions and declarations of law, all against the objection of defendants at the time.

8. Because the verdicts are against the law and evidence, and against the law under the evidence.

9. Because the verdicts should have been against the United States instead of against the defendants.

22 10. Because the Court overruled the demurrer to the evidence at the close of the case by the United States.

11. Because the Court overruled the demurrer to the evidence at the close of all the evidence.

12. Because the Court overruled defendants' motion at the close of all the evidence to direct a verdict for defendants.

13. Because the Court excluded competent and proper evidence offered by the defendants tending to prove that the Hannibal Bridge was and is a lawful structure, and that the same was built and has ever since been at all times maintained in accordance with the Act of Congress of July 25th, 1866, authorizing its erection.

14. Because the defendants were entitled to have the witnesses against them produced in Court, and to be confronted with the witnesses against them.

15. Because the Court excluded competent and proper evidence offered by the defendants tending to prove that the notice of March 10th, 1906, to alter the bridge was an arbitrary and unlawful exercise of power by the Secretary of War, and was therefore illegal and void.

16. Because the Court erred in instructing or charging the jury that the Assistant Secretary of War was authorized by law to give the defendants a notice requiring them to make alterations in the bridge.

17. Because the Court erred in charging the jury that the notice to the defendants signed "Robert Shaw Oliver, Assistant Secretary of War," described the alterations required to be made in the bridge with sufficient accuracy to enable the defendants to comply therewith.

R. BURNHAM MOFFAT,

Attorney for Hannibal Bridge Company.

WELLS H. BLODGETT,

JAS. L. MINNIS, &

GEO. A. MAHAN,

Attorneys for Wabash Railroad Company.

Endorsed: United States District Court, Northern Division, Eastern Judicial District of Missouri. No. 314. United States, Plaintiff *vs.* Hannibal Bridge Company, *et al.* Defendant. Motion for New Trial. Filed May 29, 1908. Geo. C. Moore, Clerk.

Afterwards, to-wit on the same day the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

*vs.*THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD
COMPANY, Defendants.

Now at this day comes the United States, by District Attorney, and
also come the defendants herein by their attorneys and coun-
23 sel, and this cause coming on to be heard upon the motion for
a new Trial, filed herein, and now the Court having seen and
heard said motion, upon the argument of counsel, said motion is sub-
mitted. Now the Court being fully advised and having duly consid-
ered the same: It is ordered by the Court that said motion be and
the same is hereby overruled. Thereupon the defendants except.

Afterwards, to-wit, on the same day, the following among other
proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

*vs.*THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD
COMPANY, Defendants.

Now at this day come the defendants herein, by their attorneys
and counsel, and file motion in arrest of the Judgment and Sentence
herein entered.

Which said Motion in Arrest of Judgment, is in words and figures
as follows, to-wit:

In the District Court of the United States for the Northern Division
of the Eastern Judicial District of Missouri, May Term, 1908.

UNITED STATES, Plaintiff,

*vs.*HANNIBAL BRIDGE COMPANY, and WABASH RAILROAD COMPANY,
Defendants.*Motion in Arrest of Judgment.*

Now come defendants and move the Court to arrest the judgment
herein for the following reasons of record herein:

1. That the Court obtained no jurisdiction over the person of
any defendant herein.
2. That the Court has no jurisdiction over the subject matter of
this action.
3. That the information does not state facts sufficient to constitute
a cause of action herein.

4. That the information does not state facts sufficient to constitute a cause of action against any defendant herein.

5. Because the information is insufficient in that it does not charge the defendants with any offense under any law of the United States.

6. Because the information does not charge the defendants with the commission of any offense against any law of the United States within the jurisdiction of this Court.

24 7. Because it does not appear from the record that the Court had any jurisdiction over the defendants.

8. Because the information is not sufficient to inform the defendants of the nature and cause of the accusation against them.

9. That the judgment should have been for the defendants instead of the United States.

10. That upon the record there is manifest error in said judgment.

11. That this motion was filed in same term of and within four days after rendition of verdict herein.

R. BURNHAM MOFFAT,

Attorney for Hannibal Bridge Company.

WELLS H. BLODGETT,

JAS. L. MINNIS &

GEO. A. MAHAN,

Attorneys for Wabash Railroad Company.

[Endorsed:] United States District Court, Northern Division, Eastern Judicial District of Missouri. No. 314. United States, Plaintiff, *vs.* Hannibal Bridge Company, *et al.* Defendant. Motion in Arrest of Judgment. Filed May 29, 1908. Geo. C. Moore, Clerk.

Afterwards, to-wit: on the same day the following among other proceedings were had, and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD COMPANY, Defendants.

Now at this day comes the United States, by District Attorney, and also come the defendants by their attorneys, and this cause coming on to be heard upon the motion in arrest of the Judgment and Sentence herein entered, and the Court having seen and heard said motion, upon arguments of counsel said motion is submitted.

And now the Court having duly considered the same, It is considered and ordered by the Court that said Motion in arrest be, and the same is hereby overruled. Thereupon the defendants except.

Afterwards, to-wit: on the same day, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

*vs.*THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD
COMPANY, Defendants.

Now at this day come the defendants herein, by their attorneys
and file affidavit for an appeal and pray an appeal. Upon due
consideration thereof, it is ordered by the Court, that an appeal
be allowed to the Supreme Court of the United States.

25 Which said Affidavit for Appeal is in words and figures as
follows, to-wit:

Affidavit for Appeal.

In the District Court of the United States for the Northern Judicial
District of Missouri.

No. 519.

Class 8.

UNITED STATES, Plaintiff,

*vs.*THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD
COMPANY, Defendants.

The Defendants (by their duly authorized Agent George A. Mahan,) pray an appeal herein. George A. Mahan duly authorized Agent of defendants being duly sworn, states that he is the Agent of Appellants for the purpose of taking an appeal herein, and further says, on oath, that said appeal in the above entitled cause is not made for vexation or delay, but because this affiant and appellants believe that the said appellants are aggrieved by the judgment and decision of the above named court in said cause.

GEORGE A. MAHAN.

Subscribed and sworn to before me this 29 day of May 1908.

GEO. C. MOORE, *Clerk.*

Endorsed: No. 314. United States, Plaintiff, *vs.* Hannibal Bridge Co. Wabash Railroad Co. Defendants Affidavit of Defendants Appellants. Filed in the office of the Clerk of the District Court of the United States this 29 day of May 1908. Geo. C. Moore, Clerk.

Afterwards, to-wit: on the same day the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

*vs.*THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD
COMPANY, Defendants.

26 Now at this day come the defendants herein, by their attorneys and on their motion. It is ordered by the Court that a stay of execution be had herein for sixty days from this date giving time to said defendants in which to file their bonds.

Afterwards, to-wit: on the same day the following among other proceedings were had and appear of record in said Court to-wit:

314.

UNITED STATES, Plaintiff,

*vs.*THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD
COMPANY, Defendants.

Now at this day come the defendants herein by their attorneys and move the Court for an order granting time in which to file a Bill of Exceptions. Thereupon it is ordered by the Court that leave be given to the defendants to file Bill of Exceptions herein on or before 120 days from this date.

Afterwards, to-wit: on the 20th day of July, A. D. 1908, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES OF AMERICA, Plaintiff,

*vs.*HANNIBAL BRIDGE COMPANY and WABASH RAILROAD COMPANY,
Defendants.

Now at this day comes the defendant, Hannibal Bridge Company by its Attorney and files its bond in the sum of \$10,000.00 with the Fidelity and Deposit Company of Maryland as surety, duly approved by the Honorable David P. Dyer, District Judge.

Which said Bond is in words and figures as follows, to-wit:

THE UNITED STATES OF AMERICA,

Eastern District of Missouri, ss:

We, the Hannibal Bridge Company, a corporation of the State of Missouri, principal, and the Fidelity and Deposit Company of Maryland, surety, jointly and severally acknowledge ourselves indebted

to the United States of America in the sum of ten thousand dollars (\$10,000.00), lawful money of the United States of America, to be levied on our and each of our goods, chattels, lands and tenements, upon the condition:

Whereas, said Hannibal Bridge Company has appealed to the Supreme Court of the United States from the judgment of the District Court of the United States for the Northern Division of the Eastern District of Missouri in the case in said court wherein the United States of America are plaintiffs and the said Hannibal Bridge Company, impleaded with others, is defendant;

Now, if said Hannibal Bridge Company shall appear and
 27 surrender itself in the District Court of the United States for the Northern Division of the Eastern District of Missouri on and after the filing in said District Court of the mandate of said Supreme Court of the United States and from time to time thereafter as it may be required to answer any further proceedings, and abide by and perform any judgment or order which may be had or rendered therein in the case, and shall abide by and perform any judgment or order which may be rendered in said Supreme Court of the United States and not depart from said District Court without leave thereof, then this obligation shall be void, otherwise to remain in full force and virtue.

Witness our hands and seals this Eighteenth day of June, Nineteen hundred and eight.

[SEAL.]

HANNIBAL BRIDGE COMPANY,
 By ALFRED T. WHITE, *President*.

Attest:

GUY DU VOL, *Secretary*.

[SEAL.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
 By CHAS. R. MILLER, *Vice President*.

Attest:

THOS. L. BERRY, *Assist. Secretary*.

STATE OF MARYLAND,

City of Baltimore, ss:

On this 23rd day of June, A. D. 1908 before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came Chas. R. Miller Vice-President, and Thos. L. Berry Assistant Secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself depose and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signature as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed

my Official Seal, at the City of **Baltimore**, the day and year first above written.

FRED S. AXTELL,
Notary Public.

[SEAL.]

Commission expires May, 1910.

Taken and approved this 16th day of A. D. July 1908, before me

DAVID P. DYER,
District Judge.

STATE OF NEW YORK,
County of New York, ss:

On this 22nd day of June 1908 before me personally came Alfred T. White to me known, who, being by me duly sworn did
28 depose and say that he resided in the Borough of Brooklyn, City and State of New York, that he is the President of the Hannibal Bridge Company, the Corporation described in and which executed the above instrument, that he knew the seal of said Corporation, that the seal affixed to said instrument was such corporate seal, that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order.

JOSEPH E. HAGGERTY,
Notary Public, Kings County.

[SEAL.]

•Certificate filed in N. Y. Co.

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That Joseph E. Haggerty, has filed in the Clerk's office of the County of New York, a certified Copy of his appointment and qualification as Notary Public for — County of King with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument, duly authorized to take the same. And further that I am well acquainted with the hand writing of such Notary, and believe the signature to the said certificate of proof or acknowledgment to be genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 22 day of June 1908.

[SEAL.]

PETER J. DOOLING, *Clerk.*

Endorsed: No. 314. District Court of the U. S., Eastern District of Missouri. United States of America, Plaintiffs, *vs.* Hannibal Bridge Company, impleaded with others, Defendants. Bond. Filed Jul- 20, 1908. Geo. C. Moore, Clerk.

Afterwards, to-wit: on the same day the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES OF AMERICA, Plaintiff,

vs.

HANNIBAL BRIDGE COMPANY and WABASH RAILROAD COMPANY,
Defendants.

Now at this day comes the defendant, Wabash Railroad Company, by its Attorney and files its bond in the sum of \$10,000.00, with A. R. Levering of Hannibal, Missouri, as surety, duly approved by the Honorable David P. Dyer, District Judge.

Which said Bond is in words and figures, as follows, to-wit:

29 THE UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

We, the Wabash Railroad Company, a corporation of the State of Missouri, principal, and A. R. Levering, of Hannibal, Missouri, surety, jointly and severally acknowledge ourselves indebted to the United States of America, in the sum of Ten Thousand Dollars, (\$10,000.00), lawful money of the United States of America, to be levied on our and each of our goods, chattels, lands and tenements, upon the condition:

Whereas, said Wabash Railroad Company, has appealed to the Supreme Court of the United States from the judgment of the District Court of the United States for the Northern Division of the Eastern District of Missouri, in the case in said Court wherein the United States of America are plaintiffs and said Wabash Railroad Company, impleaded with others, is defendant,

Now, if said Wabash Railroad Company shall appear and surrender itself in the District Court of the United States for the Northern Division of the Eastern District of Missouri on and after the filing in said District Court of the mandate of said Supreme Court of the United States and from time to time thereafter as it may be required to answer any further proceedings, and abide by and perform any judgment or order which may be had or rendered therein in the case, and shall abide by and perform any judgment or order which may be rendered in said Supreme Court of the United States and not depart from said District Court without leave thereof, then this obligation shall be void, otherwise to remain in full force and virtue.

Witness our hands and seals this 30th day of June, Nineteen hundred and Eight.

WABASH RAILROAD COMPANY,

[SEAL.]

By E. B. PRYOR, *Vice President*.A. R. LEVERING, *Surety*. [SEAL.]

Attest:

E. B. PRYOR,

Ass'n Secretary.

STATE OF MISSOURI,

City of St. Louis, ss:

On this 30th day of June A. D. 1908, before me, a Notary Public of the State of Missouri, in the City of St. Louis, came E. B. Pryor, Vice President and Assistant Secretary of the Wabash Railroad Company, to me personally known to be the individual and officer described in, and who executed, the preceding instrument, and acknowledged the execution of the same, and being duly sworn, says that he is the said officer of the said Company, and that the seal affixed to the preceding instrument is the corporate seal of said Company, and that said corporate seal, and his signatures as such officers, were duly affixed and subscribed to said instrument, by authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the City of St. Louis, the day and year first above written.

[SEAL.]

HANNAH BADGLEY,

Notary Public.

My commission expires June 16, 1911.

30 STATE OF MISSOURI,

County of Marion:

On this 11th day of July, 1908, before me personally appeared A. R. Levering, to me personally known to be the person who executed the foregoing instrument, and acknowledged that he executed the same for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and notarial seal at my office in Hannibal, Missouri, the day and year first above written.

[SEAL.]

A. R. SMITH,

Notary Public, Marion Co., Mo.

My commission expires March 26, 1912.

Taken and approved this 6th day of July A. D. 1908, before me.

DAVID P. DYER,

District Judge.

Endorsed: No. 314. District Court of the United States Eastern District of Missouri. United States of America, Plaintiffs *vs.* Wabash Railroad Company impleaded with others, Defendant-. Bond. Filed Jul- 20, 1908. Geo C. Moore, Clerk.

Afterwards, to-wit: on the 24th day of September, A. D. 1908, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

THE UNITED STATES, Plaintiff,

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THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY, and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Criminal Information. Violation of Act March 3, 1899, (30th Stat. L. 1153).

Now at this day come the defendants herein, by their attorneys and file Bill of Exceptions duly signed and sealed by the Honorable David P. Dyer, Judge of the District Court of the United States for the Northern Division of the Eastern Judicial District of Missouri, and ordered made a part of the record in the above entitled cause, and also files Eight Exhibits.

Which said Bill of Exceptions is in words and figures, as follows, to-wit:

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UNITED STATES

18

HANNIBAL BRIDGE CO. ET AL.

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1		April 26, 1908, session.
2		Demurrer to Defendants.
5		April 27, 1908, sessions.
4		Ruling of Court on defendants' demurrer.
18		Defts. arraigned and plead Not Guilty.
19		Information.
33		Opening statement for Government.
34		" " " Defts. reserved.
35		Admission as to incorporation defts.
35		No admission as to ownership Hannibal Bridge.
36	U. S. 1.	Lease H. B. Co. to Wabash, St. Louis & Pacific and Missouri Pacific Ry. Cos., Jan. 1, 1883.
50		Offer of contract Wabash R. R. Co. with H. B. Co. being assignment from Mo. Pac. Ry. Co. to Wabash.
51	" 2.	Letter referring to contract.
52	" " " "	" " " "
53	" " " "	" " " "
54	"	Contract above mentioned.
61	"	Testimony R. Burnham Moffat as to ownership H. B.
63	"	Jas. L. Minnis " "
66		Offer Act of Congress July 25, 1866.
67	"	" "
73		Offer of U. S. Exhibits 3 and 4.
75	4.	Certificate on Exhibit 4.

Record page.	Exhibit number.
77	1. Reference to certain part U. S. Ex. 1,
78	2. " " " 2.
80	4. Offer of part of Ex. 4.
83	3. Certificate on U. S. Ex. 3.
84	3. Complaint Diamond Joe Line to W. H. Taft, Sec. of War, Jan. 2/05.
86	Ruling of the court on above offer.
87	3. Complaints from pilots, etc.
90	3. Endorsement No. 2 Gen'l Mackenzie refers papers to Maj. Lusk, Jan. 7/05.
91	3. Endorsement No. 3, Maj. Lusk returns papers, Feb. 1/05.
92	4. Recommendation Maj. Lusk to Gen'l Mackenzie, Feb. 1/05.
98	3. Recommendation Gen'l Mackenzie to Sec. of War, Feb. 8/06.
100	4. Notice to defendant Companies of R. I. hearing.
105	4. Admission deft. H. B. Co. receipt of notice.
101	4. Notice to Geo. A. Mahan.
102	4. Affidavit A. L. Richards service, May 10/5.
103	4. Notice to Alex. M. White.
104	4. Affidavit service, " 12.
106	4. Alfred T. White.
107	4. Affidavit service, " 12.
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108	U. S. 4. Notice to A. R. Levering.
109	4. Service of above.
110	4. Notice to W. H. Blodgett.
111	4. Service of above.
112	4. Notice to W. S. Newhall.
113	4. Service of above.
114	4. Notice to Geo. J. Gould.
115	4. Service of above.
116	4. Notice to M. L. Byers.
118	4. Service of above.
119	4. Report Capt. Durham to Maj. Riche, Jan. 12, 1906.
144	4. Offer of report Maj. Riche to Gen'l Mackenzie, Jan. 13, 1906.
145	4. Offer of report Maj. Riche to Gen'l Mackenzie, Jan. 13, 1906.
151	May 28, 1908, session.
151	3. Endorsement No. 5, approval of recommendation Gen'l Mackenzie by Asst. Sec. Oliver, Feb. 9, 1905.
151	3. Endorsement No. 6, papers returned to Maj. Lusk by Gen'l Mackenzie with instructions, Feb. 13, 1905.
152	3. Endorsement No. 7, papers returned by Maj. Riche to Gen'l Mackenzie with report, Jan. 13, 1906.

Record page.	Exhibit number.	
153	3.	Endorsement No. 8, papers returned by Gen'l Mackenzie to Secretary of War, M'ch 12, 1906.
158	4.	Offer of letters preceding issuance notice to Defendants.
158		Defendants' objections to above offer.
162		Defts. offer Act of Congress M'ch 5, 1890, creating office Asst. Sec. of War.
163		Rules War Dept. governing duties.
163		Order Sec. of War Elkins, Dec. 30, 1903.
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468	"	1. Certificate on above paper.
469	"	1. Orders War Dept., Dec. 30, 1903.
178	U. S. 4.	Government offers letters preceding issuance of notices to defendants.
179	4.	Certificate as to certain Army officers.
180	4.	Letter Maj. Hodges to Maj. Riche, inclosing notice to Hannibal Bridge Co., M'ch 13, 1906.
182	4.	Offer to reply to above.
183		Letter Maj. Riche to Gen'l Mackenzie, M'ch 28, 1906.
185	4.	Offer of notice to Hannibal B. Co., M'ch 10, 1906.
186	4.	" " " "
188	4.	Affidavit service " "
189	"	" "
191	"	" "
192		Offer of letter Maj. Hodges to Col. Marshall inclosing notice to Missouri Pacific Ry. Co.
193	4.	Above letter set out.
194	4.	Affidavit service above notice.
195	4.	Offer letter Col. Marshall to Gen'l Mackenzie returning the above notice, Mar. 12, 1906.
198	4.	Notice to Missouri Pacific Ry. Co.
200	4.	Offer of letter Maj. Hodges to Col. Bixby enclosing notice to Wabash R. R. Co., M'ch 13, 1906.
201	4.	Above letter set out.
202	4.	Letter Col. Bixby to Gen'l Mackenzie returning the above notice, M'ch 17, 1906.
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203	U. S. 4.	Offer from United States Exhibit 4 of—
204	4.	Notice to Wabash Railroad Company.
206	4.	Affidavit service above notice.
208	4.	Offer from U. S. Exhibit 4 of—
210	4.	Letter of N. H. Swayne to Sec. of War Taft, M'ch 23, 1906.
212	4.	Endorsement by Private Sec'y of Secretary of War.
213	4.	Offer of Endorsement of Gen'l Mackenzie returning papers to Secretary of War, M'ch 28, 1906.
214	4.	Above endorsement is set out.
216	4.	Offer from U. S. Exhibit 4 of—

Record page.	Exhibit number.
216-a	4. Letter of Asst. Secretary of War to N. H. Swayne, Ap'l 21, 1906.
217	4. Offer from U. S. Exhibit 4 of—
218	4. Memorandum from Secretary of War to Judge-Advocate General, Ap'l 9, 1906.
219	4. Offer of—
220	4. Report of Judge-Advocate General to Secretary of War, May 15, 1906.
227	4. Endorsement on above by Secretary of War, July 14, 1906.
229	4. Offer of letters from—
230	4. Asst. Secretary of War to Geo. A. Mahan, July 20, 1906.
231	Asst. Secretary of War to F. A. Delano, July 20, 1906.
232	Asst. Secretary of War to N. H. Swayne, July 20, 1906.
233	4. Offer of transcript Rock Island Hearing Affidavits in behalf of Government and Defendants.
234	5. Transcript of Hearing at Rock Island.
274	4-A. Replies of Pilots to Circular of M'ch 25, 1905.
342	6. Affidavit in behalf Hannibal Bridge.
368	8. " " " " " "
380	9. " " " of steamboatmen.
494	10. " " " " " "
417	11. Reports of M. Meigs to Maj. Riche, Sept. 11, 1905. " " " " " " July 14, 1905. " " " " " " 16, 1905.
430	12. Affidavit of A. H. Carroll in behalf of steamboatmen.
432	14. Statement of F. A. Delano, President Wabash Railroad Company, in the hearing on Hannibal bridge matter, July 16, -906.
439	15. Authority of Geo. A. Mahan to represent Hannibal Bridge Company and Wabash Railroad Company.
441	Testimony of M. Meigs.
442	Government rests.
442	Defendants' motion to find verdict for the defendants.
446	Reply of District Attorney as to effect of assignment from The Missouri Pacific Railway Company to Wabash Railroad Company.
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454	Statement of Mr. Geo. A. Mahan for the defendants.
467	D. Ex. 1. Defendants offer " Defendants' Exhibit 1."
"	" 2. " " " " " 2.
468	" 1. Defendants' Exhibit 1, Orders of War Department.
476	" 2. Defendants' Exhibit 2, Order of Secretary of War, Elkins, dated January 17, 1893, together with Report of Major Mackenzie to General Casey, May 5, 1892.

Record page.	Exhibit number.	
489	D. Ex. 3.	Defendants offer Report of General E. K. Warren, on Hannibal Bridge.
491	" 3.	Report of General E. K. Warren, set out.
499		Defendants offer to read certain affidavits.
503		Order of Court to put all papers into this record.
505		Testimony of A. O. Cunningham.
506	" 5.	Defendants offer map.
506	" 6.	" " " map.
508		Statement in behalf of Defendant Wabash Railroad Co. as to the purpose in offering testimony.
511		Ruling of Court on above.
513		Testimony of F. M. Straine.
514	" 7	Defendants offer "Defendants' Exhibit 7," (map.)
515		Defendant The Missouri Pacific Railway Company offers Lease of Missouri, Kansas & Texas Railway to the Missouri Pacific Railway Company.
519		Lease above mentioned is set out.
530		Charge of the Court.
535		Exceptions of Defendants to the charge.
535		Request of District Attorney for additional instruc- tions.
536		Verdict of jury.
537		May 29, 1908, session.
537		Motion for sentence.
537		Sentence.
538		Motion for new trial.
540		Ruling on above motion.
541		Motion in arrest of judgment.
542		Ruling on above motion.
543		Certificate of Judge for bill of exceptions.
543		Certificate of Clerk.

35 *Index of Exhibits.*

Exhibit number.	Record Record page.	
U. S. 1	36.	Lease of Hannibal Bridge Co. to Wabash, St. Louis & Pacific Ry. and Missouri Pacific Railway Co.
" 2	54.	Assignment from Missouri Pacific to Wabash Rail- way Company of above lease.
(not numbered)		Act of Congress July 25, 1866—Page 66.
U. S. 3	73.	Various complaints, steamboatmen, etc., etc.
" 4	74.	Various papers from War Department files.
" 4-a	274.	Replies of pilots to Circular March 25, 1905.
" 5	235.	Transcript, Hearing at Rock Island.
" 6	342.	Affidavits in behalf of Bridge Company.
" 8	368.	Affidavits in behalf of Bridge Company.
" 9	380.	Affidavits in behalf of steamboatmen.
" 10	404.	" " " " "

Record page.	Exhibit number.	
U. S. 11	417.	Reports of M. Meigs.
" 12	430.	Affidavit of A. H. Carroll.
" 14	432.	Statement of F. A. Delano.
" 15	439.	Authority G. A. Mahan to represent.
" 16		Blue-print, etc., returned to War Department.
" 17		" " " " "
" 18		Photographs of Hannibal Bridge.
" 19		Blue-print returned to War Department.
" 7		" " "
" 13		" " "
D'fts' 1	468.	Orders War Department.
2	476.	Orders Secretary of War Elkins.
3	491.	Report of General E. K. Warren.
4		—serial number skipped—
5		Blue-print returned to War Department.
6		" " "
7		" " "

36 In the United States District Court in and for the Northern Division of the Eastern Judicial District of Missouri.

No. 314.

THE UNITED STATES

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY, and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Bill of Exceptions.

Be it remembered, that upon the trial of this cause, during the May Term, 1908, of the District Court of the United States, for the Northern Division of the Eastern Judicial District of Missouri, upon the 26th, 27th, 28th and 29th days of May, 1908, before the Honorable David P. Dyer, Judge of said District Court of the United States, and a jury, the following proceedings were had and evidence introduced:

The United States was represented by Mr. Henry W. Blodgett, United States District Attorney, and Mr. T. P. Young, Assistant United States District Attorney.

The Hannibal Bridge Company was represented by Mr. R. Burnham Moffat.

The Wabash Railroad Company was represented by Mr. Wells H. Blodgett, James L. Minnis and George A. Mahan.

The Missouri Pacific Railway Company was represented by Mr. Henry G. Herbel.

The following proceedings were had:

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HANNIBAL, Mo., April 26, 1908.

Court convened at ten o'clock a. m.

Counsel for the defendants filed a demurrer to the information.

Which demurrer is in words and figures following, to-wit:

"In the District Court of the United States for the Northern Division of the Eastern Judicial District of Missouri, May Term, 1908.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY, THE WABASH RAILROAD COMPANY, and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Demurrer of Hannibal Bridge Company and Wabash Railroad Company to Information.

And now comes the Hannibal Bridge Company and the Wabash Railroad Company into court, and having heard the said information herein read, say that said information and both counts thereof and all the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law,

38 and that they, the said Hannibal Bridge Company and the Wabash Railroad Company, are not bound by the law of the land to answer the same, and this the Hannibal Bridge Company and the Wabash Railroad Company are ready to verify, for the following reasons to-wit:

1st. Because it appears on the face of the information that the Secretary of War did not give notice to the defendants or either of them to alter the bridge.

2nd. Because failure or refusal to comply with a notice to alter the bridge given by the Assistant Secretary of War, is the only failure or refusal charged against the defendants, and such failure or refusal does not constitute an offense under the statute.

3rd. Because said information is insufficient and bad for repugnancy in its material allegations in this, to-wit: That the allegation that the Secretary of War gave the defendants notice to alter said bridge is repugnant to and inconsistent with the subsequent allegation that the notice given to the defendants was in substance the same as the paper writing set forth in said information, signed "Robert Shaw Oliver, Assistant Secretary of War."

4th. Because the alleged notice set forth in the information does not specify the changes that are required to be made in the bridge with such particularity as to enable the defendants to comply therewith in this, to wit: That said alleged notice states that "new and solid long or protection piers of crib-work shall be built above and below the (proposed) new pivot-pier," but does not specify or inform the defendants as to the length of the new and solid long or protection piers they are required to build above or

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below said new pivot-pier in order to comply with said pretended notice.

5th. Because said alleged or pretended notice requires that "proper guard fences be built along the Missouri shire above and below the (proposed) new shore pier," but does not specify or inform the defendants as to the length of the guard fences to be constructed along the Missouri shore by them or the kind of material of which said guard fences are to be constructed.

6th. Because the notice to defendants to alter the bridge, set out in the information, did not specify the changes to be made as required by statute.

Wherefore for want of sufficient information in this behalf, the said Hannibal Bridge Company and the Wabash Railroad Company pray judgment, and that by the court they may be dismissed and discharged from the said premises in the said information specified, and all the courts thereof.

R. BURNHAM MOFFAT,
WELLS H. BLODGETT,
JAS. C. MINNIS, &
GEO. A. MAHAN,

Attorneys for Hannibal Bridge Company and Wabash Railroad Company.

40 The counsel for the respective parties presented oral argument upon the demurrer.

The Court takes the matter under advisement until tomorrow. Thereupon further proceedings herein are adjourned until tomorrow, Wednesday, May 27, 1908 at nine o'clock.

HANNIBAL, Mo., May 27, 1908.

Court convened at nine A. M.

The Court announces the following ruling on defendants' demurrer:

The COURT: This is a demurrer to the information filed by the U. S. District Attorney.

On the 4th of June, 1907 the U. S. District Attorney filed in this court a criminal information, so called, against the Hannibal Bridge Company, the Wabash Railroad Company and the Missouri Pacific Railway Company, for a violation of the provisions of section 18 of the Rivers and Harbors Act of March 3, 1899:

That section is as follows:

Obstruction to Navigation by Bridges; Notice to Alter; Penalty on Failure to Alter; Appeal to Supreme Court.

SEC. 18. That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is

difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridges shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him wilfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every

42 month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: Provided, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants."

To the information filed a demurrer has been introduced and the grounds of demurrer assigned in this motion are as follows:

"1st. Because it appears on the face of the information that the Secretary of War did not give notice to the defendants or either of them to alter the bridge.

2nd. Because failure or refusal to comply with a notice to alter the bridge given by the Assistant Secretary of War, is the only failure or refusal charged against the defendants, and such failure or refusal does not constitute an offense under the statute

3rd. Because said information is insufficient and bad for repugnancy in its material allegations in this, to wit: That the allegation that the Secretary of War gave the defendants notice to alter said bridge is repugnant to and inconsistent with the subsequent allegation that the notice given to the defendants was in substance

43 the same as the paper writing set forth in said information, signed "Robert Shaw Oliver, Assistant Secretary of War."

4th. Because the alleged notice set forth in the information does not specify the changes that are required to be made in the bridge with such particularity as to enable the defendants to comply therewith in this, to wit: That said alleged notice states that "new and solid long or protection piers of crib-work shall be built above and below the (proposed) new pivot-pier," but does not specify or in-

form the defendants as to the length of the new and solid long or protection piers they are required to build above or below said new pivot-pier in order to comply with said pretended notice.

5th. Because said alleged or pretended notice requires that "proper guard fences be built along the Missouri shore above and below the (proposed) new shore pier," but does not specify or inform the defendants as to the length of the guard fences to be constructed along the Missouri shore by them or the kind of material of which said guard fences are to be constructed.

6th. Because the notice to defendants to alter the bridge, set out in the information, did not specify the changes to be made as required by statute."

44 Although several grounds of demurrer are assigned, the motion raises practically only two questions:

First: Was the notice signed by the Assistant Secretary of War a compliance with section 18 of the Act above quoted?

Second: Did the notice apprise the defendants with reasonable certainty of the changes and alterations required to be made?

Those are practically the questions raised by the demurrer. In all other respects it confesses the truth of each and every other allegation in this information except those which are controverted by this demurrer.

The first question, then, is as to whether the letter or notice signed by the Assistant Secretary of War is a compliance with the statute which required the Secretary of War to notify the parties to make such changes.

It is well known to every one well informed, that the question in reference to Acts of Congress conferring upon the heads of Departments certain powers, may be executed by the head of that Department or by an Assistant recognized by law. Congress never contemplated by this Act that every notice that was required to be sent under this law should be signed personally by the Secretary of War himself. It is sufficient that the Department by its principal, or any of its assistants authorized by law, should sign such notice.

That is sufficient in my judgment, to require obedience by 45 the Companies owning and operating this bridge.

There is no question raised but that this notice was received by each of the defendants. The point is, that it was not *signed* by the Secretary of War, but by the Assistant Secretary of War.

The Court holds that the notice given by the Assistant Secretary of War is in point of fact, under the law, a notice given by the Secretary of War, under this statute.

The second ground of demurrer is, that the notice does not specify with sufficient particularity what is required to be done, and all that is required to be done. It might go to the extent of saying not only what material these guards were to be constructed of, what the length of the cribs was to be or what the length of the protection should be. One might as well contend it should specify what kind of masonry should be put down, or what kind of timber should be used, or what kind of work should be done to make this protection along the river.

It is sufficient, in my judgment, to say that this notice is of such a specific character that had there been any disposition on the part of the defendants to observe the directions of the Secretary of War, there would have been no trouble in obeying the order.

Cases have been cited here, one case especially, as to what kind of a notice ought to be given, under a decision given by Judge Shiras in reference to the Keokuk & Hamilton bridge. In that case there was practically no notice at all given.

Courts differ—frequently differ. There is one good thing in our form of government, and a saving clause in it; if an inferior court goes wrong there is a superior one which may correct it.

And so in this bridge case at Keokuk, not only was the question of no notice raised, but the question of the right of Congress to delegate this power to the Secretary of War. Judge Shiras held in that case that Congress had no power to give to the Secretary of War the right to interfere in matters of this sort. That it was a matter wholly for Congress, and Congress must exercise it, and give the notice and tell what is required to be done, &c.

Judge Shiras in that case says, "If the bridge when built conforms to the requirements imposed by Congress in whatever mode they are prescribed, then the bridge is a lawful structure and the obstruction caused to the navigation of the river is authorized. Congress, cannot, without abdicating its paramount and conclusive authority in the regulation of the commercial highways of the country, confer upon the Secretary of War the right to declare that bridges lawfully erected are obstructions to free navigation and must be remodeled or removed."

That was the decision of an eminent Judge in an adjoining State, as to the power of Congress to confer upon the Secretary of War the power to regulate these bridges, and to have them changed or altered whenever they obstructed navigation.

Well, so it stood until the Supreme Court of the United States, in the case of the Union Bridge Company against the United States decided otherwise. Justice Harlan, speaking for the Supreme Court of the United States, in that case says:

"It would seem too clear to admit of serious doubt that the statute under which the Secretary of War proceeded is in entire harmony with the principles announced in former cases. In no substantial, just sense does it confer upon that officer as the head of an Executive Department powers strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the courts. It has long been the policy of the Government to remove such unreasonable obstructions to the free navigation of the waterways of the United States as were caused by bridges maintained over them. That such an object was of common interest and within the competency of Congress, under its power to regulate commerce, everyone must admit; for commerce comprehends navigation, and therefore to free navigation from unreasonable obstructions in a legitimate exertion of that power. *Gibbons v. Ogden*, 9 Wheat. L. 189, 190. As appropriate to the object to be accomplished, as a means to an end within the power of the National Government, Congress, in

execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry

48 whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation.

Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through Executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require National Legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

49 So we have it that one Federal Judge thinks Congress has no power, or that Congress had no power to confer this upon the Secretary of War. The Supreme Court of the United States, (the court of last resort) has said that Congress could confer it upon the Secretary of War; that it was utterly impracticable for the Congress of the United States to undertake by legislative action to regulate and control these bridges across navigable waters of the United States.

I fully agree with Judge Shiras in what he says in that decision respecting the notice to be given the defendants. Conceding, as he says, that Congress did have the power to confer this upon the Secretary of War, or the Secretary of War by his power received from Congress could act, still under that section of the statute, (a similar statute to the one we have under consideration here) it was the duty of the Secretary of War to give the defendant notice of what changes were expected to be made.

Now the notice that was given in the case to which I have alluded, in the case of the Keokuk bridge, was as follows, and this is the only notice that was given by the Secretary of War to the Bridge Company at Keokuk:

"I William C. Endicott, Secretary of War, do hereby notify the said Keokuk & Hamilton Bridge Company, to so alter the said bridge as to render navigation through or under it free, easy and unobstructed, and prescribe that said alteration shall be made

50 and completed on or before the 31st day of March, 1889."

That is the only notice the Bridge Company had. Judge Shiras in that opinion says:

"The next ground of demurrer is that, granting in a given case that the Secretary of War might lawfully possess and exercise the power to require the owners of a bridge over a navigable river to change or alter the construction thereof, as provided for in section 9 of the Act under consideration; nevertheless, to put the owner of the bridge in default, the notice given under the statute must point out or define in some mode what changes or alterations are required to be made."

That would seem to be perfectly fair and natural; if the Secretary of War had power to give this direction he ought in some way to indicate what changes are demanded to be made.

Now in the case decided by the Supreme Court, (*Union Bridge Company vs. United States*) the notice was given as follows:

"Captain Sibert recommends that the bridge in question be so altered as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second span from the Pittsburg shore to give a clear headroom over the Davis Island Pool of not less than 70 feet; and the first span from the same shore to give a headroom of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered
51 structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island Pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed."

The Supreme Court of the United States held that that notice was specific enough to require the Bridge Company and Railroad Companies to change it and make it in accordance with that notice.

Now in this particular case what did the Secretary of War require, and what was his notice?

"Whereas, The Secretary of War has good reason to believe that the draw bridge, commonly known as the Wabash Railway Bridge, owned or operated by the Hannibal Bridge Company, *inter alia* across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable waterways of the United States) on account of unsuitable location of the draw-spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers; there being difficulty in passing the draw openings or draw-spans of such bridge by rafts, steamboats, or other water craft;

And, whereas, the following alterations which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy and unobstructed, to-wit:

52 (a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers of crib work to be built above and below the new pivot pier; the existing cribs and crib piers to be removed, and proper

guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw openings on the new location of draw-span to give at all stages of the river a clear width of waterway of not less than one hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers."

If this Bridge Company, or those that were operating and controlling the bridge, desired or wanted to make the changes as required by the Secretary of War, there is little excuse for not doing so on account of this notice. It is sufficient and specific enough in its character to give them notice of what was required to preserve this waterway. It is just as much the duty of Congress, and just as much

53 the duty of the Secretary of War, to preserve the waterways of the United States for free navigation as it is to protect the Railroad Companies in the transportation of freight from one State to another.

The demurrer is overruled.

Defendants except to the ruling of the Court on the demurrer of the Defendants.

Another case being in progress, further hearing herein is adjourned until tomorrow, May 28, 1908.

HANNIBAL, MO., THURSDAY, May 28, '08.

Court convened at 9 a. m. and the following proceedings were had:

DISTRICT ATTORNEY: I wish to call attention to the fact that none of these defendant companies have been arraigned and entered a plea.

NOTE.—Each of the defendants appears, waives the reading of the information, and enters a plea of not guilty.

Thereupon the panel is called and examined.

The District Attorney waiving the making of any challenges, the counsel for defendants make six challenges.

Thereupon the jury is sworn to try the case.

The District Attorney then reads the information.

Said information is in the words and figures following to-wit:

54 UNITED STATES OF AMERICA,

Eastern District of Missouri, Northern Division:

In the District Court of the United States Within and for the Division and District aforesaid, at the May Term of said Court, in the Year of Our Lord One Thousand Nine Hundred and Seven.

Henry W. Blodgett, Attorney of the United States, for the Eastern District of Missouri, who in this behalf prosecutes in the name of the United States, and for the United States, comes hereinto said Court

on the 4th day of June, in the year of our Lord One Thousand Nine Hundred and Seven, in his own proper person, and for the United States, and states upon his oath and to the best of his information and belief, and gives the Court here to understand and be informed; that the Hannibal Bridge Company, the Wabash Railroad Company and the Missouri Pacific Railway Company, are, each of them, corporations organized under and existing by virtue of the laws of the State of Missouri, and that each of said Companies has been such a corporation continuously and without interruption for the period of time extending from the first day of May, in the year of our Lord One Thousand Nine Hundred and Five to the first day of May in the year of our Lord One Thousand Nine Hundred and Seven,

and is now such corporation; that heretofore, to-wit, on the 55 first day of May, in the year of our Lord One Thousand Nine Hundred and Five, at the County of Marion, in the Division and District aforesaid, and within the jurisdiction of this Court, the aforesaid corporations owned and controlled a railroad bridge, commonly called the "Hannibal" or "Wabash" Bridge, over the Mississippi River, extend from the west or Missouri bank, in the said County of Marion, to the east, or Illinois bank of said river, said Mississippi river being then and there and at all times herein mentioned, a navigable waterway of the United States; that the aforesaid corporations have continuously owned and controlled said railroad bridge at said place, over said navigable waterway, from the said first day of May in the year of our Lord One Thousand Nine Hundred and Five, up to the first day of May in the year of our Lord One Thousand Nine Hundred and Seven.

That said railroad bridge was constructed under and by virtue of, and subject to, and authorized by an Act of Congress known as the Act of July 25th, 1866: "An Act to authorize the construction of certain bridges and to establish them as Post Roads;" wherein and whereby it is provided as follows, to-wit:—"That if any bridge built under this Act shall be constructed as a draw-bridge, the same shall be constructed as a pivot draw-bridge, with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw—that 56 said railroad bridge is and was at all times herein mentioned

a pivot draw-bridge, and as such has during all said time been an illegal and unlawful structure and an illegal and unlawful obstruction to navigation upon said river at said place in this, to-wit: that the spans of said bridge have been during all said time less than one hundred and sixty feet in the clear on each side of the central or pivot pier of the draw of said bridge.

That, to-wit: on the first day of May, in the year of our Lord One Thousand Nine Hundred and Five, the Secretary of War, having good reason to believe, and believing, that said railroad bridge constructed and located as aforesaid, was an unreasonable obstruction to the free navigation of said Mississippi River, which in fact was and is true, in this, to-wit: on account of the unsuitable location of the draw spans and protection cribs; the lack of suitable guard

fences or sheer booms; and the presence of obstructing rip-rap around the piers of said bridge, and that there was difficulty in passing the draw openings or draw spans of such bridge by rafts, steamboats or other water-craft, caused a notice to be served upon each of the herein defendant corporations, notifying each of them as the owners and controllers of said railroad bridge, that it was proposed to require certain changes, to-wit: the changes enumerated and set forth in the notice contained herein, and set forth immediately below, to be made in said bridge, and that each of the herein defendant corporations would be given a reasonable opportunity to be heard in the matter.

Each of said notice, omitting the name of the person or corporation to whom the same was directed, was in substance and to the effect, as follows, to-wit:

Whereas, The Secretary of War has good reason to believe that the bridge over the Mississippi River at Hannibal, Mo., commonly known as the Wabash Railroad Bridge, is an unreasonable obstruction to the free navigation of the Mississippi River, on account of unsuitable location of the draw-spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers, it is proposed to require the following changes to be made in said bridge by the first day of July, 1906, to-wit: As per attached slip:

'The West draw-pier (first pier from Missouri shore) to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot pier; and proper guard fences to be built along the Missouri shore above and below the new shore-pier.

Each of the draw-openings on the new location of draw-span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers.'

In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me in Room 28, at U. S. Engineer Office, Post Office Bldg., 16th St. and 2d Ave. in Rock Island, Ill., at 10 o'clock A. M. on the Sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War:

C. S. RICHE,
Major, Corps of Engineers."

58 That thereafter, to-wit: on the 10th day of March, in the year of our Lord One Thousand Nine Hundred and Six, each of the defendant corporations herein, at said time having had a reasonable opportunity to be heard on said proposed certain changes in said bridge, the Secretary of War gave notice to each of the defendant corporations herein, as the corporations owning and controlling the aforesaid railroad bridge, to alter the same so as to render navigation through or under it reasonably free, easy and unobstructed, and that in said notice the Secretary of War specified the changes recommended by the Chief of Engineers that were required to be made, to-wit: the changes enumerated and set forth in the notice contained herein and set forth immediately below, and therein said notice prescribed a reasonable time in which to make said specified changes recommended as aforesaid, which said reasonable time in which to make said specified changes recommended as aforesaid, was the period of time from the date of giving said notice up to and which expired on the fifteenth day of March, in the year of our Lord one thousand nine hundred and seven.

That the Secretary of War gave said notice to alter said bridge as aforesaid, to said defendant corporations, as the corporations owning and controlling said bridge, by serving upon each of said corporations a copy of a notice, which said notice, omitting the name of the person or corporation to whom the same was directed, was in substance and to the effect as follows, to-wit:

"Take notice that:—

59 Whereas, The Secretary of War has good reason to believe that the drawbridge, commonly known as the Wabash Railway Bridge, owned or operated by the Hannibal Bridge Company, *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable water-ways of the United States) on account of unsuitable location of the draw-spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers; there being difficulty in passing the draw-openings or draw-spans of such bridge by rafts, steamboats or other watercraft:

And whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy and unobstructed, to-wit:

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib work, to be built above and below the new pivot pier; the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw-openings on the new location of draw-span to give at all stages of the river a clear width of water-way of

not less than one hundred and sixty feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers;

And, whereas, To March 15th, 1907, is a reasonable time in which to alter the said bridge as described above;

Now, therefore, In obedience to, and by virtue of, section eighteen of an Act of Congress of the United States entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes", approved March 3, 1899 (30 Stat. L. 1153), the Secretary of War hereby notifies the said Hannibal Bridge Company, the Wabash Railroad Company and the Missouri Pacific Railway Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15th, 1907.

ROBERT SHAW OLIVER,
Asst. Secretary of War."

60 That after the expiration of such reasonable time, prescribed as aforesaid, in which to make said specified changes in said railroad bridge, recommended as aforesaid, that is, to-wit, upon the 16th day of March in the year of our Lord One Thousand Nine Hundred and Seven, the aforesaid alterations and changes in said Railroad Bridge recommended and specified as aforesaid, had not been made by the herein defendant corporation or any of them; but on the contrary each of said corporations owning and controlling said railroad bridge after receiving the aforesaid notice from the Secretary of War, to make said alterations and changes in said railroad bridge, specified and recommended as aforesaid, within the reasonable time prescribed by the Secretary of War, as aforesaid, did, unlawfully and wilfully fail and refuse to make said alterations and changes in said railroad bridge specified and recommended as aforesaid, within the reasonable time prescribed by the Secretary of War, as aforesaid, and that each of the said defendant corporations did therein and thereby unlawfully and wilfully fail and refuse to comply with the lawful order of the Secretary of War in the premises, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States.

Wherefore, said Attorney, in behalf of the United States, prays the consideration of the Court here in the premises, and that due process of law may be awarded against the said Hannibal Bridge Company, the Wabash Railroad Company, and the Missouri Pacific Railway Company in this behalf.

Second Count.

In the District Court of the United States, within and for the Division and District aforesaid, at the November Term of said Court, in the year of Our Lord One Thousand Nine Hundred and Seven.

Henry W. Blodgett, Attorney of the United States, for the Eastern District of Missouri, who in this behalf prosecutes in the name of the United States, and for the United States, comes hereinto said Court on this — day of June, in the year of our Lord One Thousand Nine Hundred and Seven, in his own proper person, and for the United States, and further states upon his oath and to the best of his information and belief, and gives the Court here to understand and be informed; that the Hannibal Bridge Company, the Wabash Railroad Company and the Missouri Pacific Railway Company, are, each of them, corporations organized under and existing by virtue of the laws of the State of Missouri, and that each of said companies has been such a corporation continuously and without interruption for the period of time extending from the first day of May, in the year of our Lord One Thousand Nine Hundred and Five to the first day of May in the year of our Lord One Thousand Nine Hundred and Seven, and is now such corporation; that heretofore, to-wit, on the first day of May, in the year of our Lord One Thousand Nine Hundred and Five, at the County of Marion, in the

62 Division and District aforesaid, and within the jurisdiction of this Court, the aforesaid corporations owned and controlled a railroad bridge, commonly called the "Hannibal" or "Wabash" Bridge, over the Mississippi River, extending from the West or Missouri Bank, in the said County of Marion, to the East, or Illinois bank of said river, said Mississippi River being then and there and at all times herein mentioned, a navigable waterway of the United States; that the aforesaid corporations have continuously owned and controlled said railroad bridge at said place, over said navigable waterway from said first day of May in the year of our Lord One Thousand Nine Hundred and Five, up to the first day of May in the year of our Lord One Thousand Nine Hundred and seven.

That said railroad bridge was constructed under, by virtue of, and subject to, and authorized by an Act of Congress known as the Act of July 25, 1866, "An Act to authorize the construction of certain bridges and to establish them as Post Roads"; wherein and whereby it is provided as follows, to-wit: "That if any bridge built under this act shall be constructed as a draw-bridge, the same shall be constructed as a pivot draw-bridge with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty (160) feet in length in the clear on each side of the central or pivot pier of the draw"; —that said railroad bridge is and at all times herein mentioned was, a pivot draw bridge, and as such has during all said time been an

63 illegal and unlawful structure and an illegal and unlawful obstruction to navigation upon said river at said place in this, to-wit: that the spans of said bridge have been during all said time less than one hundred and sixty feet in the clear on each side of the central or pivot pier of the draw of said bridge.

That, to-wit: on the first day of May, in the year of our Lord One Thousand Nine Hundred and Five, the Secretary of War, having good reason to believe, and believing, that said railroad bridge constructed and located as aforesaid, was an unreasonable obstruction to the free navigation of said Mississippi River, which in fact was and is true, in this, to-wit: on account of the unsuitable location of the draw-spans and protection cribs; the lack of suitable guard fences or sheer booms; and the presence of obstructing rip-rap around the piers of said bridge, and that there was difficulty in passing the draw openings or draw-spans of such bridge by rafts, steamboats or other water-craft, caused a notice to be served upon each of the herein defendant corporations, notifying each of them as the owners and controllers of said railroad bridge, that it was proposed to require certain changes, to-wit: the changes enumerated and set forth in the notice contained herein, and set forth immediately below, to be made in said bridge, and that each of the herein defendant corporations would be given a reasonable opportunity to be heard in the matter.

Each of said notices, omitting the name of the person or corporation to whom the same was directed, was in substance and to the effect, as follows, to-wit:

64 "Wherefore, the Secretary of War has good reason to believe that the bridge over the Mississippi River at Hannibal, Mo., commonly known as the Wabash Railway Bridge, is an unreasonable obstruction to the free navigation of the Mississippi River, on account of unsuitable location of the draw-spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers. It is proposed to require the following changes to be made in said bridge by the first day of July 1906, to-wit. As per attached slip.

'The West draw-pier (first pier from Missouri shore) to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work, to be built above and below the new pivot-pier; and proper guard fences to be built along the Missouri shore above and below the new shore pier.

'Each of the draw-openings on the new location of draw-span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

'The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers.'

In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby noti-

fied that a hearing will be had before me, in room 28, at U. S. Engineer Office, Post Office Bldg., 16th St. and 2nd Ave. in Rock Island, Ill. at 10 o'clock a. m. on the Sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision, it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War:

C. S. RICHE,
Major, Corps of Engineers."

That thereafter, to-wit, on the 10th day of March in the year of our Lord One Thousand Nine Hundred and Six, each of the defendant corporations herein, at said time having had a reasonable opportunity to be heard on said proposed certain changes
65 in said bridge, the Secretary of War gave notice to each of the defendant corporations herein, as the corporation- owning and controlling the aforesaid railroad bridge, to alter the same so as to render navigation through or under it reasonably free, easy and unobstructed, and that in said notice the Secretary of War specified the changes recommended by the Chief of Engineers that were required to be made, to-wit: the changes enumerated and set forth in the notice contained herein and set forth immediately below, and therein said notice prescribed a reasonable time in which to make said specified changes recommended as aforesaid, which said reasonable time in which to make said specified changes recommended as aforesaid, was the period of time from the date of giving said notice up to and which expired on the fifteenth day of March, in the year of our Lord One Thousand Nine Hundred and Seven.

That the Secretary of War gave said notice to alter said bridge as aforesaid, to said defendant corporations, as the corporations owning and controlling said bridge, by serving upon each of said corporations a copy of a notice, which said notice, omitting the name of the person or corporation to whom the same was directed, was in substance and to the effect as follows, to-wit:

"Take notice that.

Whereas, The Secretary of War has good reason to believe that the draw bridge, commonly known as the Wabash Railway Bridge, owned or operated by the Hannibal Bridge Company, *inter alia*,
66 across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable waterways of the United States) on account of unsuitable location of the draw-spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers; there being difficulty in passing the draw openings or draw-spans of such bridge by rafts, steamboats, or other water-craft;

And, whereas, the following alterations which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy and unobstructed, to-wit:

(a) The west draw-rest pier (first pier from Missouri shore) to

be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers of crib work, to be built above and below the new pivot pier; the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw openings on the new location of draw-span to give at all stages of the river a clear width of waterway of not less than one hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers;

And, Whereas, To March 15th, 1907, is a reasonable time in which to alter the said bridge as described above;

Now, Therefore, In obedience to, and by virtue of, Section eighteen of an Act of the Congress of the United States entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes" approved March 3rd, 1899 (30 Stat. L. 1153), the Secretary of War hereby notifies the said Hannibal Bridge Company, the Wabash Railroad Company, and the Missouri Pacific Railway Company, to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15th, 1907.

ROBERT SHAW OLIVER,

Asst. Secretary of War."

67 That after the expiration of a period of one month after the expiration of such reasonable time prescribed as aforesaid, in which to make said specified changes in said railroad bridge, recommended as aforesaid, that is, to-wit: upon the first day of May in the year of our Lord One Thousand Nine Hundred and Seven, the aforesaid alterations and changes in said Railroad Bridge recommended and specified as aforesaid had not been made by the herein defendant corporations, or any of them; but on the contrary each of said corporations owning and controlling said railroad bridge after receiving the aforesaid notice from the Secretary of War, to make said alterations and changes in said railroad bridge, specified and recommended as aforesaid, within the reasonable time prescribed by the Secretary of War, as aforesaid, did, unlawfully and *unwilfully* fail and refuse to make said alterations and changes in said railroad bridge specified and recommended as aforesaid, for the period of one month after the expiration of the reasonable time prescribed by the Secretary of War, as aforesaid, and that each of the said defendant corporations did therein and thereby unlawfully and wilfully fail and refuse to comply with the lawful order of the Secretary of War in the premises, contrary to the form of the Stat-

utes in such case made and provided, and against the peace and dignity of the United States.

Wherefore, said Attorney, in behalf of the United States, prays the consideration of the Court here in the premises, and that due process of law may be awarded against the said Hannibal Bridge Company, the Wabash Railroad Company, and the Missouri Pacific Railway Company in this behalf.

HENRY W. BLODGETT,
*United States Attorney for the
Eastern District of Missouri.*

Subscribed and sworn to before the undersigned on this 15th day of May in the year of our Lord One thousand Nine Hundred and Seven.

WALTER M. NALL,
*Clerk of the District Court of the United States for
the Eastern Division, Eastern District of Missouri.*

The District Attorney makes the following opening statement.

May it please the Court, and gentlemen of the jury:

The Government will show you by its evidence in this case (which evidence will be confined almost entirely to the documentary evidence and records of the War Department in regard to the hearing which was conducted by that Department at Rock Island, Illinois, and the subsequent proceedings in regard to that hearing in the War Department at Washington, D. C.), that there were certain complaints filed with the Secretary of War against the Hannibal Bridge in its present condition. These complaints were filed by river men interested in the navigation of the river.

When those complaints were received, in due and proper form, the Secretary of War ordered a hearing to be conducted at Rock Island, Illinois, on the 1st day of May, 1905, at which time not only were these defendant companies afforded an opportunity to be heard, but they were heard; they availed themselves of their opportunity, and introduced evidence in support of their position in this matter.

We expect to show you that after that hearing recommendations were made by the proper officers of the War Department, recommending that this bridge be altered and changed so as to cause it to cease to be an unreasonable obstruction to the navigation of the Mississippi river.

That on those recommendations the Secretary of War issued an order which was directed to and received by and served upon each one of these three defendant companies, ordering them to make the specified changes in the Hannibal bridge, so that structure would cease to be an unreasonable obstruction to the navigation of that river. In that order the Secretary of War fixed March 15, 1907 as a reasonable time, at that time, allowing the defendant companies over a period of twelve months to make the alterations ordered and directed by the Secretary of War.

The evidence will further show you not only a failure, but a direct

and wilful refusal on the part of all three of those companies to comply with the lawful order of the Secretary of War in the premises.

That is, briefly, a statement of the Government's case.

Counsel for the defendants announced that they reserved their right to make a statement until the close of the Government's evidence.

70 DISTRICT ATTORNEY: The first evidence the Government will introduce will be in regard to the incorporation of the three companies defendant. I take it from my conversation with defendant's counsel that they admit their incorporation under the laws of the State of Missouri. All three companies are separate and distinct Missouri corporations.

NOTE.—That is admitted.

The COURT: Is there any further admission in reference to the ownership of this bridge?

Mr. MINNIS: We have not made any admission as to the ownership of the bridge.

DISTRICT ATTORNEY: I offer in evidence the lease of the Hannibal Bridge Company to the Wabash, St. Louis & Pacific Railway Company, and Missouri Pacific Railway Company, said lease being dated January 1, 1883, and being a lease of the Hannibal Bridge to these companies by the Hannibal Bridge Company.

Mr. MINNIS: That is objected to as not showing who owns the bridge, or who operates the bridge, or any other fact.

Mr. MOFFAT: We object to the document because it is immaterial and does not tend to show the ownership of the bridge or who is operating the bridge, or any other fact material to this inquiry.

The COURT: The objection is overruled.

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

71 The paper referred to is marked Plaintiff's Exhibit No. 1. United States Exhibit No. 1 is in the words and figures following, to-wit:

(This exhibit is in book form, and following memoranda appear on front cover:)

(Burlington)

No. 6916—

No. 6.

(Then follows title:)

Ex. 13.

The Hannibal Bridge Company
to
The Wabash, St. Louis and Pacific and the Missouri Pacific Railway
Companies.

Lease.

Dated January 1st, 1883.

(Memoranda:)

Rt. to W. A. Grinshaw. Filed in the Office of the Clerk Circuit Court. Mar. 16, 1883. W. R. Wilson, Clerk, Pike County, Ill. 12 1/4 P. M. \$3.00.

72 (On first page of the lease is pasted the Clerk's Certificate of record, as follows:)

STATE OF ILLINOIS,
County of Pike:

I, William R. Wilson, Clerk of the Circuit Court and *Ex-Officio* Recorder within and for said County, certify that the annexed instrument, with the certificate of acknowledgment thereto attached, was filed for record on the 16th day of March, 1883, at the hour of 12 1/4 o'clock P. M., and is recorded in my office in Volume 2 of Miscellaneous Records Page 323 to 328.

Given under my hand and seal of said Court, at my office in Pittsfield, the day and date above mentioned.

W. R. WILSON,
Clerk & Ex-Officio Recorder.

This indenture, made this first day of January, one thousand eight hundred and eighty-three, by and between the Hannibal Bridge Company, a corporation organized and existing under and by virtue of the laws of the States of Illinois and Missouri, and hereinafter called the lessor company, party of the first part, and the Wabash, St. Louis and Pacific Railway Company, a consolidated corporation organized and existing under and by virtue of the laws of Ohio, Indiana, Illinois and Missouri, and the Missouri Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, hereinafter called the lessee companies,

73 parties of the second part, Witnesseth:

First. That the said lessor company, for and in consideration of the rents, covenants and agreements hereinafter mentioned and to be by the said parties of the second part fully paid, kept and performed, hath demised and let, and by these presents doth demise and let unto the said lessee companies, all and singular the bridge of said lessor company on and over the Mississippi River at Hannibal, Missouri, together with the railroads, turnpike or wagon roads, tunnels, bridges, culverts, and other structures belonging to said lessor company, and forming a continuous line of railway from the rail-

road of the said Wabash, St. Louis and Pacific Railway Company to the railroad of the said Missouri Pacific Railway Company, with all the lands, tenements, hereditaments and appurtenances, foundations, masonry, abutments, materials, structures, equipment and property of every kind whatsoever, whether real or personal, belonging to the said lessor company, whether in the State of Missouri or in the State of Illinois, or on, in and over the Mississippi River, between the States above named; and all the rights, powers, privileges and franchises of the said lessor company therein or thereto pertaining. To have and to hold the said described and demised premises, with all the privileges and appurtenances pertaining thereto, unto the said lessor companies, parties of the second part, their successors

74 and assigns, for and during the full term of ninety-nine years, commencing the first day of January, one thousand eight hundred and eighty-three; and also hath assigned and hereby doth assign to the said lessee company all and singular, the rights, interests, terms of years and estates to the said lessor company given or secured under or by virtue of any and all leases, contracts and agreements entered into or held by said lessor company for the use and enjoyment of any property real or personal, in connection with or appurtenant to said bridge and its approaches, and said railroad tracks or any part thereof; all of which leases, contracts and agreements the said lessee companies hereby assume, and hereby jointly and severally covenant, promise and agree to and with the said lessor company that they will, at all times hereafter, do, keep and perform all acts, matters and things in and by such leases, contracts and agreements required to be kept, done, or performed by the said lessor company.

Second. The said lessee companies hereby, jointly and severally, covenant and agree to and with the said lessor company to pay the said lessor company through its proper officers, in the City of New York, as and for the rental of the premises hereby demised: (1) the sum of sixty-eight thousand dollars, lawful money of the United States of America, in each and every year of the term hereby created, the said sum to be paid in equal quarterly installments on the first days of January, April, July and October, in each year from and after the date of these presents, free and clear of all taxes or other charges. (2) All taxes, assessments and other like charges paid or imposed upon the corporate property and franchises of said lessor company, and upon the premises hereby demised or any part thereof, or upon the revenues or earnings of the same during the term hereby created.

75 Third. The said lessee companies do further jointly and severally covenant and agree to and with the said lessor company that all surplus earnings arising from the use and operation of the premises hereby demised shall be paid to the Mercantile Trust Company of the City of New York, or such other trustee as may be agreed on by the parties hereto, until the aggregate of sums so paid shall amount to the sum of one hundred thousand dollars, which sum shall thereafter remain in the hands of said trustee, or any successor who may be agreed on by the parties hereto, as security for the performance by

the lessees herein of their covenants under this lease. The lessee companies further, jointly and severally, covenant and agree that the sums so paid in for account of said trust shall not be less than ten thousand dollars in each year after the execution of this lease until the said sum of one hundred thousand dollars is made up.

It is further mutually understood and agreed that all interest upon said sum of one hundred thousand dollars which may be paid by said trustee shall be paid and belong to the lessee companies in the proportion in which the said sum of one hundred thousand dollars

76 shall have been paid in by them respectively.

Fourth. It is hereby mutually covenanted and agreed by and between the parties hereto, the parties of the second part covenanting jointly and severally, that the said lessee companies shall and will maintain and keep the premises hereby demised and every part thereof in good condition, and at their own expense make all necessary repairs and renewals of the same property, including all renewals and repairs which may become necessary from fire, floods, collisions, or whatever accident or cause, and the rebuilding of the demised premises in case of their destruction in whole or in part, and operate and use the same for the purposes for which the said lessor company holds the same, and shall and will indemnify and save harmless to the said lessor company of and from any and all claims for damages arising out of said operation or use. All permanent improvements and additions to the property hereby demised, shall, upon the termination of this lease, become the property of said lessor company.

Fifth. It is further mutually understood and agreed that in case of default by said lessee companies in any of the matters or things herein contained or provided for, and the continuance of such default for sixty days, the said lessor company shall have the right to enter upon all and singular the premises hereby demised, and the

77 same to re-possess and enjoy in the same manner as if these presents had not been made, and to recover from the said lessee companies such amount as may be necessary to put the property in its present good condition, in addition to all other damages.

Provided, however, that if at any time within said sixty days the lessee company not in default shall make the payment or perform the agreement in respect to which default may have been made, then and in such case the party so making good the default of the other shall thenceforth be solely entitled to all the benefit of the provisions of this lease in the same manner and to the same effect as if it had been named herein as sole lessee.

And it is further provided, that if default is made it shall not release the said lessee companies, or either of them from any of the covenants, conditions and agreements herein contained.

Sixth. That the said lessor company shall and will make such provision as may be required for the payment of salaries of its necessary officers, and shall and will do all and singular such acts and things as may be necessary or required by law to maintain and renew its corporate existence.

In witness whereof, the said parties have caused their respective

corporate seals to be affixed to these presents, (except that the Hannibal Bridge Company has no corporate seal), and the same
 78 to be subscribed in their names on their behalf by their respective Presidents and Secretaries the day and year first above written.

THE HANNIBAL BRIDGE COMPANY,
 By ALEX. M. WHITE, *President*.

Attest:

ALFRED T. WHITE, *Secretary*.

THE WABASH, ST. LOUIS AND PACIFIC
 RAILWAY COMPANY,

By A. L. HOPKINS, *1st Vice President*.

[Seal Wabash, St. Louis and Pacific Railway Company, 1879.]

Attest:

O. D. ASHLEY,
2nd Secretary.

THE MISSOURI PACIFIC RAILWAY
 COMPANY,

By JAY GOULD, *President*.

[Seal the Missouri Pacific Railway Company, 1880.]

Attest:

A. H. CALEF, *Secretary*.

STATE OF NEW YORK,

City and County of New York, ss:

Be it remembered that on this first day of March, 1883, personally
 came before me, the undersigned, a Notary Public, within and
 79 for the county aforesaid, Alexander M. White, who, being by me duly sworn, doth depose and say that he is the President of the Hannibal Bridge Company, lessor in the foregoing instrument; that the name of said company is signed to said instrument by him, as President of said Company, by virtue of the order of the Board of Directors; and the said Alexander M. White, as President, acknowledged the foregoing instrument to be the act and deed of the Hannibal Bridge Company, for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office, this 1st day of March, 1883.

[Seal Will. W. Cotton, Notary Public, Kings & New York Cos.]

W. W. COTTON,

Notary Public, Kings County, New York.

Certificate filed in New York County.

STATE OF NEW YORK,

City and County of New York, ss:

I, Patrick Keenan, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County,

the same being a Court of Record, do hereby certify that W. W. Cotton has filed in the Clerk's office of the County of New York, a certified copy of his appointment as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed Instrument, duly authorized to take the same. And further, that I am well acquainted with the hand-writing of such Notary, and verily believe the signature to the said certificate of proof or acknowledgment to be genuine. I further certify, that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Court and County, the 2 day of M^{ch} 1883.

[SEAL.]

PATRICK KEENAN, *Clerk*.

[New York Seal.]

STATE OF NEW YORK,

County of New York, ss:

Be it remembered that on this 1st day of March, 1883, personally came before me, the undersigned, a Notary Public within and for the county aforesaid, Alfred T. White who, being by me duly sworn, doth depose and say that he is the Secretary of the Hannibal Bridge Company, lessor in the foregoing instrument; that he countersigned the said instrument by order of the Board of Directors thereof.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office, this 1st day of March, 1883.

[Seal Will. W. Cotton, Notary Public, Kings & New York Cos.]

W. W. COTTON,

Notary Public, Kings County, New York.

Certificate filed in New York Court.

81 STATE OF NEW YORK,

City and County of New York, ss:

Be it remembered that on this 1st day of March, 1883, personally came before me, the undersigned, a Notary Public within and for the county aforesaid, A. L. Hopkins, who being by me duly sworn, doth depose and say that he is the 1st Vice President of the Wabash, St. Louis and Pacific Railway Company, lessee in the foregoing instrument; that the name of said company is signed to said instrument by him, as President of said company, by virtue of the order of the Board of Directors; that the seal of the company attached thereto is the proper and genuine seal of said company, and is affixed thereto by order of said Board of Directors. And the said A. L. Hopkins, as 1st Vice President, acknowledged the foregoing instrument to be the act and deed of the Wabash, St. Louis and Pacific Railway Company, for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office; this 1st day of March, 1883.

[Seal Will. W. Cotton, Notary Public, Kings & New York Cos.]

W. W. COTTON,
Notary Public, Kings County, New York.

Certificate filed in New York County.

82 STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on this 1st day of March, 1883, personally came before me, the undersigned, a Notary Public within and for the county aforesaid, O. D. Ashley, who being by me duly sworn, doth depose and say that he is the Secretary of the Wabash, St. Louis and Pacific Railway Company, lessee in the foregoing instrument; that he countersigned the said instrument and affixed the seal of said company thereto by order of the Board of Directors thereof.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office, this 1st day of March, 1883.

[Seal Will. W. Cotton, Notary Public, Kings & New York Cos.]

W. W. COTTON,
Notary Public, Kings County, New York.

Certificate filed in New York County.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this 1st day of March, 1883, personally came before me, the undersigned, a Notary Public, within and for the county aforesaid, Jay Gould, who, being by me duly sworn, doth depose and say that he is the President of the Missouri Pacific Railway Company, lessee in the foregoing instrument; that the name of said company is signed to said instrument by him, as President of said company, by virtue of the order of the Board of Directors; that the seal of the company attached thereto is the proper and genuine seal of said company, and is affixed thereto by order of said Board of Directors. And the said Jay Gould as President, acknowledged the foregoing instrument to be the act and deed of the Missouri Pacific Railway Company, for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office, this 1st day of March, 1883.

[Seal Will. W. Cotton, Notary Public, Kings & New York Cos.]

W. W. COTTON,
Notary Public, Kings County, New York.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on this 1st day of March, 1883, personally came before me, the undersigned, a Notary Public within and for the county aforesaid, A. H. Calef who, being by me duly sworn; doth depose and say that he is the Secretary of the Missouri Pacific Railway Company, lessee in the foregoing instrument; that
84 he countersigned the said instrument and affixed the seal of said company thereto by order of the Board of Directors thereof.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office, this 1st day of March, 1883.

[Seal Will. W. Cotton, Notary Public, Kings & New York Cos.]

W. W. COTTON,
Notary Public, Kings County, New York.

Certificate filed in New York County.

(Following memoranda on back cover:) 6. See contract 488 for Receipt. Copied 4/2/07.

85 DISTRICT ATTORNEY: I offer in evidence the contract of the Wabash Railroad Company with the Hannibal Bridge Company, being in the nature of an assignment by the Missouri Pacific Railway Company of its interests to the Wabash Railroad Company, under the lease which has already been introduced in evidence.

Mr. MINNIS: We object to the introduction of this paper, for the same reasons stated in the previous objection.

The COURT: The objection is overruled.

To which ruling the defendants, by their counsel, then and there, at the time duly excepted.

The paper referred to is marked "United States Exhibit 2."

86 United States Exhibit No. 2 is in the words and figures following, to-wit:

OFFICE OF HANNIBAL BRIDGE CO.,
No. 130 WATER STREET,
NEW YORK, 31st December, 1906.

W. A. & A. M. White.

(Memo. in pencil:) *Contract. 6.*

F. L. O'Leary, Esq., Treasurer Wabash R. R. Co., St. Louis, Mo.

DEAR SIR: The late President of the Hannibal Bridge Co., Mr. A. M. White, died on October 31st and I succeeded him in that office.

The present Treasurer is Mr. W. A. White, whose address is also at this office. Please direct further remittances to him, and oblige

Yours truly,

ALFRED T. WHITE,
President Hannibal Bridge Co.

87

OFFICE OF HANNIBAL BRIDGE CO.,
NO. 130 WATER STREET,
NEW YORK, April 1st, 1898.

Mr. F. L. O'Leary, Treasurer, The Wabash Railroad Co., St. Louis,
Mo.

DEAR SIR: I received today draft for \$17,000 "for rent of Hannibal Bridge for the quarter ending March 31st, 1898, as per terms of lease dated January 1st, 1883" with the accompanying form of receipt which I hesitate to sign on account of the words which I have enclosed in pencil parentheses.

I presume this notice of agreement between the joint lessees of the Bridge is inserted merely by way of explanation as to why a single check is sent this time instead of two checks, each for half of the amount, as heretofore, but I would prefer to sign a new receipt with the words bracketed omitted, if you will forward one, and presume this will be equally satisfactory to you.

The Bridge Company must, I take it for granted, stand on the lease of 1883 only, as that is the only agreement to which it is a party.

Yours respectfully,

ALFRED T. WHITE, *Treas.*

88

*The Wabash Railroad Company, Office J. Ramsey, Jr.,
Vice Pres't & Gen'l Manager.*

ST. LOUIS, MO.

ON THE LINE, Feb. 19th, 1898.

Mr. D. B. Howard, Auditor.

DEAR SIR: I beg to hand you herewith, for your records, agreement executed by Mr. Ashley, President of the Wabash Company, and Mr. Gould, President of the Missouri Pacific Company, covering the transfer by the Missouri Pacific to the Wabash of all its right and interest in and to the Hannibal Bridge.

Very truly yours,

J. RAMSEY, Jr.,
Vice Pres't. & Gen. Mgr.

89

Whereas, the Hannibal Bridge Company did on the first day of January, 1883, enter into a lease with The Wabash, St. Louis and Pacific Railway Company and the Missouri Pacific Railway Company whereby the said Bridge Company demised and let unto the said two Railway Companies for a period of ninety-nine years, all and singular the Bridge of said lessor Company on and over the Mississippi River at Hannibal, Missouri, together with other rights, leases and properties thereto appertaining, all of which is more fully set forth and described in said lease, and said Railway Companies did by said lease covenant to pay an annual rental of \$68,000 and did enter into other covenants in said lease set forth which said lease was duly executed by said Bridge Company and said Railway Companies on the date aforesaid; and

Whereas, The Wabash Railroad Company has succeeded to all the rights, obligations and duties of said Wabash, St. Louis and Pacific Railway Co., under and pursuant to said lease; and

Whereas, said Railway Companies are desirous that all the rights and duties arising under said lease should accrue to and be assumed by said Wabash Railroad Company,

Now, this Agreement Witnesseth:

That said Wabash Railroad Company, for and in consideration of the assignment to it by said Missouri Pacific Railway Company of all its rights, powers and privileges under the terms of said
90 lease, does hereby covenant and agree to pay all the rental and charges arising under the terms of said lease and to perform all the covenants thereof and to save the said Missouri Pacific Railway Company free and harmless from all expenses, charges or obligations of any kind which may at any time arise under or by reason of said lease or the covenants therein contained and the said Missouri Pacific Railway Company for and in consideration of said covenant and promise of said Wabash Railroad Company, hereinbefore set forth, does hereby assign, transfer and set over to said Wabash Railroad Company, the said hereinbefore described lease and also all the rights, titles, property, powers and privileges which the said Missouri Pacific Railway Company now has or may at any time have by, under or pursuant to the terms of said lease.

This agreement and all rights, covenants and assignments herein contained are to take effect on the first day of January, 1898.

In witness whereof, the said Railroad Companies have caused their respective corporate seals to be affixed to these presents and the same to be subscribed in their names on their behalf by their respective Presidents and Secretaries, this 31st day of December, 1897.

THE WABASH RAILROAD CO.,

By O. D. ASHLEY, *President*.

[Seal The Wabash Railroad Company, 1899.]

Attest:

J. C. OTTESON, *Secretary*.

91

THE MISSOURI PACIFIC RY. CO.,

By GEO. J. GOULD, *President*.

[Seal The Missouri Pacific Railway Company, 1880.]

Attest:

A. H. CALEF, *Secretary*.

92

STATE OF NEW YORK,

City and County of New York, ss:

Be it remembered that on this 31st day of December 1897, personally came before me, the undersigned, a Notary Public within and for the county aforesaid, Ossian D. Ashley, who being by me duly sworn, doth depose and say that he resides in the City of New York, that he is the President of The Wabash Railroad Company,

one of the parties to the foregoing instrument; that the name of said company is signed to said instrument by him, as President of said Company, by virtue of the order of the Board of Directors, that the seal of the company attached thereto is the proper and genuine seal of said company and is affixed thereto by order of said Board of Directors. And the said Ossian D. Ashley, as President, acknowledged the foregoing instrument to be the act and deed of The Wabash Railroad Company, for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office, this 31st day of December, 1897.

[Seal Wm. Arnoux, Notary Public, New York.]

WM. ARNOUX,

Notary Public, New York Co.

93 STATE OF NEW YORK,
 County of New York, ss:

Be it remembered that on this 31st day of December 1897, personally came before me, the undersigned, a Notary Public within and for the county aforesaid, John C. Otteson who, being by me duly sworn, doth depose and say that he resides in the City of Brooklyn, N. Y., that he is the Secretary of The Wabash Railroad Company, one of the parties to the foregoing instrument, that he countersigned the said instrument by order of the Board of Directors thereof.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office, this 31st day of December 1897.

[Seal Wm. Arnoux, Notary Public, New York.]

WM. ARNOUX,

Notary Public, New York Co.

STATE OF NEW YORK,
 City and County of New York, ss:

Be it remembered that on the 31st day of Dec., 1897, personally came before me, the undersigned, a Notary Public, within and for the county aforesaid George J. Gould who, being by me duly sworn, doth depose and say that he resides in Lakewood, N. J., that he is the President of the Missouri Pacific Railway Company, one

94 of the parties to the foregoing instrument; that the name of said company is signed to said instrument by him, as President of said Company, by virtue of the order of the Board of Directors; that the seal of the company attached thereto is the proper and genuine seal of said company, and is affixed thereto by order of said Board of Directors. And the said George J. Gould as President, acknowledged the foregoing instrument to be the act and deed of the Missouri Pacific Railway Company, for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office, this 31st day of Dec., 1897.

[Seal H. L. Utter, Notary Public, Kings & New York Co's,
N. Y.]

H. L. UTTER.

STATE OF NEW YORK,

County of New York, ss:

Be it remembered that on this 31st day of Dec. 1897, personally came before me, the undersigned, a Notary Public within and for the county aforesaid, A. H. Calef who, being by me duly sworn; doth depose and say that he resides in Seabright, N. J., that he is the Secretary of the Missouri Pacific Railway Company, one of the parties to the foregoing instrument; that he countersigned the
95 said instrument and affixed the seal of said company thereto by order of the Board of Directors thereof.

In witness whereof, I have hereunto set my hand and affixed my notarial seal of office this 31st day of Dec. 1897.

[Seal H. L. Utter, Notary Public, Kings & New York Co's,
N. Y.]

H. L. UTTER.

(On cover of this agreement is following endorsement:) No. 6. The Wabash Railroad Co. Contract with Hannibal Bridge Co. for Assignment by the Missouri Pacific Ry. Co. of its interests to the Wabash R. R. Co. Takes Effect January 1st. 1898. Expires —, —, 189—. Ex. 14. L. M. E.

96 R. BURNHAM MOFFAT, a witness of lawful age, being duly produced, sworn and examined, on the part of the plaintiff, testified as follows:

Direct examination.

By the DISTRICT ATTORNEY:

Q. What is your name?

A. R. Burnham Moffat.

Q. Where do you reside?

A. New York.

Q. What is your occupation?

A. Lawyer.

Q. You are attorney for the Hannibal Bridge Company?

A. I am.

Q. Do you know what company owns the bridge across the Mississippi River, extending from the Missouri to the Illinois shore, at Hannibal, Missouri?

A. I decline to answer, on the ground that any information I have acquired is privileged by reason of the relation of attorney and client, which exists between me and the Hannibal Bridge Company.

Q. Aren't you an officer of the Hannibal Bridge Company?

A. I am not.

Q. I repeat the question.

A. (No answer.)

The COURT: Answer the question, do you know who owns and operates this bridge?

A. I have no knowledge of the fact.

97 DISTRICT ATTORNEY (resuming):

Q. Don't you know that the Hannibal Bridge Company own the bridge across the river here?

Mr. MINNIS: Objected to, for the reason that manifestly anything the witness would testify to would be mere hearsay. He says he has no knowledge.

The COURT: He may answer of his knowledge.

A. I have no knowledge.

DISTRICT ATTORNEY (resuming):

Q. You are here representing the Hannibal Bridge Company?

A. I am here as attorney in this case, for the Hannibal Bridge Company.

Q. Do you know whether the Hannibal Bridge Company receives any rent for that bridge?

A. I have no knowledge of the fact.

Q. You do not know whether the Bridge Company receives any rent?

A. I do not.

Q. Do you know it does not receive any rent?

A. I do not.

Q. How long have you been attorney for the Hannibal Bridge Company?

A. I have no regular retainer for the Hannibal Bridge Company. I am not its regular attorney. I was asked to come out here and represent its interest in this case.

Q. By whom?

98 A. By the President of the Hannibal Bridge Company.

Mr. MINNIS: I wish to except to the ruling of the Court in directing the witness to answer.

Mr. MOFFAT: I desire to except to the action of the Court in instructing me to answer when I claimed privilege.

The COURT: The Court holds there is no privilege. I directed you to answer of your own knowledge.

JAMES L. MINNIS, a witness of lawful age, being duly produced, sworn and examined on the part of the plaintiff, testified as follows:

Direct examination.

By the DISTRICT ATTORNEY:

Q. Your name is James L. Minnis?

A. Yes.

Q. You are one of the attorneys of the Wabash Railroad Company?

A. Yes.

Q. Do you know to whom the Wabash Railroad Company pays rental for the use of the Hannibal bridge?

Mr. MAHAN: Objected to, on the ground that that is immaterial. It is not a case of ownership or payment of rental. The question is objected to as irrelevant and immaterial.

99 The COURT: The objection is overruled.

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

A. I have not any personal knowledge that anybody pays rent.

DISTRICT ATTORNEY (resuming question): Do you remember telling me that the Wabash Railroad Company paid its rental direct to the Hannibal Bridge Company?

A. Yes, but I have no knowledge of it. My understanding of it from hearsay is—

The COURT:

Q. From whom did you hear it? Any officer of the Wabash Railroad Company?

A. I can not say. We run our trains over the bridge.

DISTRICT ATTORNEY (resuming question): The Wabash Railroad Company operated the bridge?

A. Yes sir.

Q. And you pay rent for it?

A. That is merely a presumption. What I would say would be from hearsay.

Q. You pay rent for it under and by virtue of that assignment of the lease (indicating Plaintiff's Exhibit 2).

A. I have no knowledge about the payment. If you want to know my judgment from hearsay—

Q. I am not asking you about the payment, but this (indicating Plaintiff's Exhibit 2), is the agreement under which the bridge is now operated by the Wabash Railroad Company, being the
100 paper which you handed me this morning in response to my request for such a paper?

A. Yes, Plaintiff's Exhibit 2. This is the paper under which the Wabash Railroad Company now operates the Hannibal bridge.

101 DISTRICT ATTORNEY: I offer in evidence the Act of Congress of July 25, 1866, which authorized the construction of the Hannibal Bridge, the bridge here in question, and more especially call attention to paragraph 13 of that Act, which places the future regulation of that bridge under the control of Congress.

I do this for the purpose of getting that in evidence, such Act being in my opinion private in nature.

The COURT: It may be considered in evidence.

The Act referred to is in the words and figures following, to-wit:

102 July 25, 1866. Chap. CCXLVI.—An Act to Authorize the Construction of Certain Bridges, and to Establish Them as Post Roads.

Bridge may be built across the Mississippi River at Quincy, Illinois, and railroad tracks laid thereon.

Trains may cross for compensation.
Question of obstruction to navigation may be tried where.

Bridge may be built with draw or unbroken spans.

Height, if made with unbroken spans.

Length of spans.

Pivot draw - bridge, with draw over main channel, and spans, &c.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That it shall be lawful for any person or persons, company or corporation, having authority from the States of Illinois and Missouri for such purpose, to build a bridge across the Mississippi River at Quincy, Illinois, and to lay on and over said bridge railway tracks, for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge, under the limitations and conditions hereinafter provided. And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the district court of the United States of any State in which any portion of said obstruction or bridge touches.

SEC. 2. And be it further enacted, That any bridge built under the provisions of this act may, at the option of the company building the same, be built as a drawbridge, with a pivot or other form of draw, or with unbroken or continuous spans: Provided, That if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation in any case than fifty feet above extreme high-water mark, as understood at the point of location, to the bottom chord of the bridge, nor shall the spans of said bridge be less than two hundred and fifty feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river and not less than three hundred feet in length: and provided also, That if any bridge built under this act shall be constructed as a drawbridge, the same shall be constructed as a pivot drawbridge with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw: and the next ad-

joining spans to the draw shall not be less than two hundred and fifty feet; and said spans shall not be less than thirty feet above low-water mark, and not less than ten above extreme high-water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current of the river: And provided also, That said draw shall be opened promptly upon reasonable signal for the passage of boats, whose construction shall not be such as to admit of their passage under the permanent spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw during or after the passage

104 of trains.

SEC. 3. And be it further enacted, That any bridge constructed under this act, and according to its limitations, shall be a structure, and shall be recognized and known as a post route; upon which, also no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge.

SEC. 4. And be it further enacted, That it shall be lawful for the Chicago, Burlington, and Quincy Railroad Company, a corporation whose road has been completed to the Mississippi River, and connects with a railroad on the opposite side thereof, having first obtained authority therefor from the States of Illinois and Iowa, to construct a railroad across said river, upon the same terms, in the same manner, under the same restrictions and with the same privileges, as is provided for in this act in relation to the bridge at Quincy, Illinois.

SEC. 5. And be it further enacted, That a bridge may be constructed at the town of Hannibal, in the State of Missouri, across the Mississippi River, so as to connect the Hannibal and Saint Joseph Railroad with the Pike County and Great Western railroads of Illinois, on the same terms and subject to the same restrictions as contained in this act for the construction of the bridge at Quincy, Illinois.

SEC. 6. And be it further enacted, That a bridge may be constructed across the Mississippi River between Prairie du Chien, in the
105 State of Wisconsin, and North McGregor, in the State of Iowa, with the

Draw to be opened promptly, except, &c.

Bridges constructed according to this act to be lawful structures and post routes.

Rates of toll.

Chicago, Burlington and Quincy Railroad Company may build a railroad bridge across the Mississippi, if, &c.

Bridge may be built across the river at Hannibal, Missouri;

Between Prairie du Chien and North McGregor;

Between Keokuk and
Hamilton ;

consent of the legislatures of Wisconsin and Iowa, on the same terms and subject to the same restrictions, as are contained in this act for the construction of the bridge at Quincy, Illinois.

SEC. 7. And be it further enacted, That the Keokuk and Hamilton Mississippi Bridge Company, a corporation existing under the laws of the State of Iowa, and the Hancock County Bridge Company, a corporation existing under the laws of the State of Illinois, be and are hereby authorized to construct and maintain a bridge over the Mississippi River between Keokuk, Iowa, and Hamilton, Illinois, of the same character, description, and construction as provided in this act for the bridges at Quincy and Burlington, and the said Bridge, in its use and operation, shall be subject to the same restrictions that apply to said bridges at Quincy and Burlington by the terms of this act.

Between Winona and
opposite bank of river,
if, &c. ;

SEC. 8. And be it further enacted, That the Winona and Saint Peter Railroad Company, a corporation existing under the laws of the State of Minnesota, is hereby authorized to construct and operate a railroad bridge across the Mississippi River between the city of Winona, in the State of Minnesota, and the opposite bank of the river, in the State of Wisconsin, with the consent of the legislatures of the States of Minnesota and Wisconsin; and said bridge by this section authorized is hereby declared a post route, and subject to all the terms, restrictions, and requirements contained in the foregoing sections of this act.

This bridge made a
post road;

Between Dunleith and
Dubuque, if, &c. ;

106 SEC. 9. And be it further enacted, That a bridge may be constructed and maintained across the Mississippi River, between Dunleith, in the State of Illinois, and Dubuque, in the State of Iowa, with the consent of said States previously given or hereafter acquired, with the same privileges, upon the same terms, and under the same restrictions as are contained in this act for the construction of a bridge at Quincy, Illinois.

SEC. 10. And be it further enacted, That any company authorized by the legislature of Missouri may construct a bridge across the Missouri River, at the city of Kansas, upon the same terms and conditions provided for in this act.

Between the city of
Saint Louis and East
Saint Louis.

SEC. 11. And be it further enacted, That the "Saint Louis and Illinois Bridge Company," a corporation organized under an act of the gen-

eral assembly of the State of Missouri, approved February fifth, eighteen hundred and sixty-four, and an act amendatory of the same, approved February twentieth, eighteen hundred and sixty-five, and also confirmed in its corporate powers under an act of the legislature of the State of Illinois, approved eighteen hundred and sixty-four, or any other bridge company organized under the laws of Missouri and Illinois, be, and the same is hereby, empowered to erect, maintain, and operate a bridge across the Mississippi River, between the city of Saint Louis, in the State of Missouri, and the city of East Saint Louis, in the State of Illinois, subject to all the conditions contained in said act of incorporation and amendments thereto, and not inconsistent with the following terms and provisions contained in this act. And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said waters, the cause may be tried before the

107 district court of the United States of any State in which any portion of said obstruction or bridge touches.

SEC. 12. And be it further enacted, That the bridge authorized by the preceding section to be built shall not be a suspension bridge, or drawbridge, with pivot or other form of draw, but shall be constructed with continuous or unbroken spans, and subject to these conditions: First, that the lowest part of the bridge or bottom chord shall not be less than fifty feet above the city directrix at its greatest span. Second, that it shall have at least one span five hundred feet in the clear, or two spans of three hundred and fifty feet in the clear of abutments. If the two latter spans be used, the one over the main steamboat channel shall be fifty feet above the city directrix, measured to the lowest part of the bridge at the centre of the span. Third, no span over the water at low-water mark, shall be less than two hundred feet in the clear of abutments.

SEC. 13. And be it further enacted, That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved.

Approved, July 25, 1866.

Questions of obstruction, where may be tried.

Bridge to be built with unbroken spans.

Conditions, height and length of span.

Act may be altered, &c.

108 DISTRICT ATTORNEY: I will mark for identification two packages of papers.

The papers referred to are marked, respectively, "Plaintiff's Exhibit 3" and "Plaintiff's Exhibit 4." I will read from these papers such portions as I desire, and if the defendants wish to use them they may do so.

These papers are transcripts of the records of the War Department, under the seal of the Department, and they are offered under the Act of Congress.

Mr. HERBEL: So far as the Missouri Pacific Railway Company is concerned, I have no knowledge of any notice having been served on that company of a regular hearing at Rock Island. Counsel here have presented a bulk of papers, in which they say there is such a notice. I want to examine them and see if there is any such notice, and service of it.

The DISTRICT ATTORNEY: So our position can be clearly understood on this matter, I will state that we are not admitting that we are under obligation now, or at any other time, to furnish all our proofs to counsel on the other side. On several occasions, at their request, we have placed these very papers at their disposal, for examination, and have extended all courtesies, and have gone beyond the usual requirements to do so.

109 The COURT: You have offered certain papers: Now offer the first paper you wish to offer, and then they may object if they see fit.

Mr. HERBEL: I object to him offering them in bulk.

The COURT: Let us have no controversy about it.

DISTRICT ATTORNEY: We offer the whole thing, and we will read what we wish, and if they wish to read anything in it they may do so.

Mr. MINNIS: We object because they are some of the documents, and only a part of the proceedings before the War Department in regard to this bridge.

The COURT: The District Attorney will offer the first paper he wishes to offer in evidence, and may read it if he desires to do so.

Mr. MINNIS: He says he has offered it.

The COURT: I can not pass on it until I know what it is. If the District Attorney desires to offer all these papers in evidence, and they are so certified, let that be done, and furnish them to the defendants and let them make objection to it.

DISTRICT ATTORNEY: I will do that as soon as I can get back my papers from one or all of the defendants' counsel.

Mr. MINNIS: My objection is, that he does not offer them.

110 The DISTRICT ATTORNEY: I will offer in evidence "United States Exhibit 4," purporting to be, as the certificate on its face indicates, the certificate of the Acting Secretary of War. This certificate is as follows:

UNITED STATES OF AMERICA,
WAR DEPARTMENT.
WASHINGTON, D. C., April 17, 1907.

I hereby certify that the papers hereto attached are true copies of papers of record in the office of the Chief of Engineers, United States Army. I further certify that H. F. Hodges, and C. S. Riche were on the 10th day of March, 1906, Majors, Corps of Engineers; also that on the 20th day of March, 1906, W. L. Marshall was Lieutenant-Colonel, Corps of Engineers, and also that W. H. Bixby was, on the 10th day of March, 1906, Lieutenant-Colonel, as indicated by the copies of the reports hereto attached.

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

Be it known that A. Mackenzie, who signed the foregoing certificate, is the Chief of Engineers, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof, I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this 17th day of April one thousand nine hundred and seven.

[Seal United States of America, War Office.]

ROBERT SHAW OLIVER,
Acting Secretary of War.

111 Colonel BLODGETT: Where a bundle of papers is offered in evidence in that way, I think we should have some opportunity to examine them. We have never seen them.

The COURT: Allowance may be had of a reasonable amount of time in which defendants' counsel may examine these papers.

Mr. MINNIS: I have an additional objection, that the documents offered in evidence show that they are only a part of the record of proceedings before the Secretary of War. I would think it is competent to offer an entire transcript of that entire proceeding, as you would of any proceeding in court; but you can not isolate certain records and offer in evidence those parts of records.

The COURT: If these papers have any bearing upon this case, they may be offered, no matter whether there is one certificate or a dozen.

The objection is overruled.

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

The COURT: We will take a recess of one-half hour, to give counsel an opportunity of examining these papers.

Recess was here taken.

112 After recess the following proceedings were had:

Colonel BLODGETT: I understand it is your Honor's desire, as it is of all of us, to get along in an orderly way and understand at each stage what we are doing. Your Honor understands that there are three defendants here, each with large interests in this case. Each

is represented by its counsel. So far as objections are concerned, we would like your Honor to permit each counsel to state his own objection, and have the stenographer take it down, so that we may proceed in an orderly way.

The COURT: Certainly. I suggest to the District Attorney, as I did before recess, that he offer each paper that he deems material to his case, and let counsel on the other side make their objection to that particular paper; in that way we will get the record complete and there will be no confusion in the matter at all. We can not try a case of this kind by offering a whole lot of testimony at one time, without giving an opportunity to have objection made to each particular paper that the defendant may desire to make.

The DISTRICT ATTORNEY: Before proceeding any further, I desire to direct the attention of the Court and the Jury to this language on page 1 of Exhibit 1:

"First. That the said lessor company, for and in consideration of the rents, covenants and agreements hereinafter mentioned, 113 and to be by the said parties of the second part, fully paid, kept and performed, hath demised and let, and by these presents doth demise and let, unto the said lessee companies, all and singular the bridge of said lessor company, on and over the Mississippi River, at Hannibal, Missouri, together with the railroads, turnpike, or wagon roads, tunnels, bridges, culverts, and other structures, etc."

The lessor company being in that lease the Hannibal Bridge Company, and the lessee companies being the Wabash, St. Louis and Pacific Railway Company and the Missouri Pacific Railway Company.

The COURT: You offered the entire paper in evidence?

The DISTRICT ATTORNEY: Yes, your Honor, and call especial attention to that language.

"United States Exhibit 2," which has also been offered in evidence, is the assignment entered into on the 31st day of December, 1897, by the Missouri Pacific Railway Company, assigning to the Wabash Railroad Company all the rights to operate that bridge as a railroad bridge.

I desire to read the following from said paper:

"That said Wabash Railroad Company, for and in consideration of the assignment to it by said Missouri Pacific Railway Company of all its rights, powers and privileges under the terms of said lease, does hereby covenant and agree to pay all the rental and charges arising under the terms of said lease and to perform all the covenants thereof and to save the said Missouri Pacific Railway Company free and harmless from all expenses, charges or obligations of any kind which may at any time arise under or by reason of said 114 lease or the covenants therein contained and the said Missouri Pacific Railway Company for and in consideration of said covenant and promise of said Wabash Railroad Company, hereinafter set forth, does hereby assign, transfer and set over to said Wabash Railroad Company, the said hereinbefore described lease and also all the rights, titles, property, powers and privileges which

the said Missouri Pacific Railway Company now has or may at any time have by, under or pursuant to the terms of said lease.

"This agreement and all rights, covenants and assignments herein contained are to take effect on the first day of January, 1898.

"In witness whereof, the said Railroad Companies have caused their respective corporate seals to be affixed to these presents and the same to be subscribed in their names on their behalf by their respective Presidents and Secretaries, this 31st day of December, 1897.

THE WABASH RAILROAD CO.,
By O. D. ASHLEY, *President*.

[Seal The Wabash Railroad Company, 1889.]

Attest:

J. C. OTTESON, *Secretary*.

THE MISSOURI PACIFIC RY. CO.,
By GEO. J. GOULD, *President*.

[Seal The Missouri Pacific Railway Company, 1880.]

Attest:

A. H. CALEF, *Secretary*.

115 DISTRICT ATTORNEY: In offering this Exhibit 4, I offered it for the purpose of having it identified, and was reading and offering in evidence at the time the certificate of the War Department, under the seal of that department, issued by the Acting Secretary of War, for the purpose of establishing who certain army officials mentioned here were at the time, and the connection they bore to that department. That is the part I read. This paper may be considered as only marked at this time for the purpose designated.

I now offer the certificate in evidence, for the purpose to which I have just directed the Court's attention:

The COURT: If there is no objection, it has already been read.

The DISTRICT ATTORNEY: I now offer in evidence from "United States Exhibit 3," which has been marked for the purpose of identification, a certain complaint made to the Honorable W. H. Taft, Secretary of War, in regard to the Hannibal Bridge, under date of January 2, 1905. I will read this first paper——

Mr. MOFFAT: In this complaint made by the Diamond Jo Line of Steamers to the Secretary of War, which the District Attorney is about to read, I would like to object to the materiality of the

116 paper, and would ask the Court to instruct the Jury, if, as I apprehend from your Honor's ruling which you made a moment ago, you will rule that the paper would be material, that the paper read is not evidence of the truth or falsity of any of the statements contained in it.

The COURT: That will be considered at the proper time in the instructions to the Jury.

I suppose the District Attorney is now offering this complaint that was made, leading up to what is alleged in the information to have been the action of the Department upon that information.

Mr. MOFFAT: But the statements appear in this complaint as a part of the proceedings before the War Department which culminated in the notice of March tenth; I concede the paper is proper. But I think it is pertinent and proper for the Court to instruct the Jury at this stage, in regard to any of these papers read, that they should not consider the truth or falsity of any statement contained therein, but regard them as simply papers filed with the War Department.

The COURT: The Court will permit the paper to be read and will take care of this point in the instructions to the Jury at a later stage.

To which ruling the defendants, by their counsel, then and there, at the time duly excepted.

The COURT: I do not know what the paper is, and I am not
117 going to instruct the Jury in regard to a paper I have not seen or heard read.

The District Attorney may read the paper.

The District Attorney thereupon read the communication headed:

"Diamond Jo Line Steamers.

SUPERINTENDENT'S OFFICE,

DUBUQUE, IOWA.

and dated January 2, 1907; addressed to W. H. Taft, Secretary of War, Washington, D. C., and signed John Killeen, Supt.

The paper referred to is in the words and figures following, to-wit:

118 United States Exhibit No. 3 is in the words and figures following, to-wit:

UNITED STATES OF AMERICA,

WAR DEPARTMENT,

WASHINGTON, April 17, 1907.

I hereby certify that the papers attached are true copies of papers of record in the office of the Chief of Engineers, United States Army.

A. MACKENZIE,

Brig. Gen., Chief of Engineers, U. S. Army.

Be it known that A. Mackenzie, who signed the foregoing certificate, is the Chief of Engineers, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof, I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this eighteenth day of April one thousand nine hundred and seven.

[Seal United States of America, War Office.]

ROBERT SHAW OLIVER,

Actg Secretary of War.

119 The Old Reliable Between St. Louis and St. Paul.

Diamond Jo Line Steamers.

SUPERINTENDENT'S OFFICE,
DUBUQUE, IOWA, *January 2nd, 1905.*

Hon. W. H. Taft, Secretary of War, Washington, D. C.

DEAR SIR: Enclosed herewith please find three petitions taking in the Mississippi River from St. Paul to St. Louis inclusive. On these petitions are the signatures of steamboat owners, steamboat employees and a very few of the business men from the prominent river towns.

The Hannibal Bridge is to-day, and has been since its construction, the most dangerous obstruction on the Mississippi River more especially in high water owing to the narrowness of the river at that point. There have been four steamboats sunk there and from two to fifteen lives lost on each one, the last accident occurring a year ago last summer.

Our Company, the Diamond Jo Line Steamers, is the principal passenger line of boats between St. Louis and St. Paul. This bridge has been a great expense to us, as we consider it so dangerous that the writer, who has been on the river fifty years, holding a master's license for thirty-five years, has never run a boat going down stream through this bridge in the night, and for the past fourteen
120 years, having been superintendent for the line, I have never permitted any of the boats belonging to the company to do it on account of what I consider the danger to life and property.

It has occurred to me that the United States through our worthy President, who has taken hold of the inspection of steamboats, that it would be a good time to take this up with you as Secretary of War. I would be willing to go on the stand to-day and make affidavit that the Hannibal Bridge as it is today is more of a menace to life on this river than all the boilers on steamboats on the river and all danger and risk to be taken from fire. To prove this, I will say that in the last twenty years there have been more lives lost on the Mississippi River at this bridge than have been lost from explosions and fire on the river from St. Louis to St. Paul in the same length of time.

Brig.-Gen. A. Mackenzie, Chief, United States Engineer, is as well posted on what is needed to be done at Hannibal as any living man.

Trusting you will give this matter your kind consideration, I remain,

Very respectfully,

JOHN KILLEEN, *Supt.*

3 Encls.

121 The COURT: Gentlemen of the jury, you will be instructed by the Court, after having heard this paper read, that any statements contained in that paper as to the dangerous character of this Hannibal bridge, will not be considered by you.

This paper is offered, as I understand it, for the purpose of leading up to the subsequent action taken by the Secretary of War,

and the allegation as to whether the bridge is a dangerous one or not is not for your consideration now.

The DISTRICT ATTORNEY: I will continue to read from the same exhibit.

The District Attorney thereupon read paper signed by C. P. Martin, Pilot; J. P. Lusk, (Master); Jule T. Calhoun (Master and Pilot) and fourteen other names.

Also a paper signed by owners and Captains.

Also paper signed Linehan Ry. Transf. Co., Bert E. Linehan, Mgr.; Diamond Jo Line Steamers, by John Killeen, Supt.; T. H. Dolson, 1 Mate & Pilot; S. I. Dolson, (Master & Pilot) and many others:

Which papers are in words and figures as follows, to-wit:

122 We, the undersigned vessel-owners, masters, pilots, and others interested in the navigation of the Upper Mississippi River, respectfully submit to the Honorable Secretary of War that the bridge over the Mississippi River at Hannibal, Missouri, is, in its present condition, an unreasonable obstruction to the free navigation of the said river by reason of the location of the existing draw-openings, the entire absence of guide-fences or sheer-booms, and the presence of artificial deposits of stone about the piers of the said bridge, which deposits we believe to have increased the current through the draw-openings to a dangerous extent; and we respectfully ask that the Secretary of War, under the powers granted him by Section 18 of the River and Harbor Act approved March 3, 1899, and after a due hearing of all interested persons or corporations, shall require such alterations to be made in and about the said bridge as shall render navigation through it reasonably free, easy and unobstructed.

C. P. MARTIN, *Pilot*,
J. P. LUSK, (*Master*),
JULE T. CALHOUN,
(*Master and Pilot*),

(and fourteen other names.)

123 We, the undersigned, vessel-owners, masters, pilots, and others interested in the navigation of the upper Mississippi River, respectfully submit to the Honorable Secretary of War that the bridge over the Mississippi River at Hannibal, Missouri, is, in its present condition, an unreasonable obstruction to the free navigation of the said river by reason of the location of the existing draw-openings, the entire absence of guide-fences or sheer-booms, and the presence of artificial deposits of stone about the piers of the said bridge, which deposits we believe to have increased the current through the draw-openings to a dangerous extent; and we respectfully ask that the Secretary of War, under the powers granted him by Section 18 of the River and Harbor Act approved March 3, 1899, and after a due hearing of all interested persons or corporations, shall require such alterations to be made in and about the said bridge as

shall render navigation through it reasonably free, easy and unobstructed.

HARRY CLARK,
Gen. Agt. Diamond Jo Line Steamers, St. Paul, Minn.
 R. D. NEWCOMB,
Master & Pilot.

I. M. NEWCOMB, *Capt.*,
 C. M. FRANCIES, *Owner*,
 IRA A. FULLER, *Capt.*,

(and a number of others)

124 We, the undersigned, vessel-owners, masters, pilots, and others interested in the navigation of the upper Mississippi River, respectfully submit to the Honorable Secretary of War that the bridge over the Mississippi River at Hannibal, Missouri, is, in its present condition, an unreasonable obstruction to the free navigation of the said river by reason of the location of the existing draw-openings, the entire absence of guide-fences or sheer-booms, and the presence of artificial deposits of stone about the piers of the said bridge, which deposits we believe have increased the current through the draw openings to a dangerous extent; and we respectfully ask that the Secretary of War, under the powers granted him by Section 18 of the River and Harbor Act approved March 3, 1899, and after a due hearing of all interested persons or corporations, shall require such alterations to be made in and about the said bridge as shall render navigation through it reasonably free, easy and unobstructed.

LINEHAN RY. TRANS. CO.,
 BERT E. LINEHAN, *Mgr.*
 DI-MOND JO LINE STEAMERS,
 By JOHN KILLEEN, *Supt.*
 T. H. DOLSON, *Master & Pilot*,
 S. I. DOLSON, (*Master & Pilot*),

(and many others)

125 The COURT: In reference to these matters, gentlemen of the jury, as I said in reference to the first paper read, no fact stated in that petition is to be taken by you as being true, or is to be considered by you in this case. They are offered only for the purpose of showing that these people lodged a complaint with the Secretary of War in reference to these matters.

DISTRICT ATTORNEY: I now offer and read in evidence endorsement No. 2 of Exhibit No. 3, being the endorsement of Brig. Gen'l Mackenzie, under date of January 7, 1905, in regard to the complaints just read: It is in words and figures as follows:

"2nd indorsement,

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *January 7, 1905.*

Respectfully referred to Maj. J. L. Lusk, Corps of Engineers, for report.

To be returned.

By command of Brig. Gen. Mackenzie:

H. F. HODGES,
Major, Corps of Engineers.

126 DISTRICT ATTORNEY: I now offer and read in evidence endorsement No. 3 of Exhibit No. 3, being the endorsement of Major J. L. Lusk in regard to the same complaint.

Mr. MINNIS: I wish to object to these endorsements: This is a criminal case and we are entitled to be confronted with the witnesses who testified against us. The District Attorney is reading what purports to be the acts of different persons, who can of course come here and testify as to those acts. In lieu of that he is offering merely a paper or a copy of papers. We object to that.

The COURT: The objection is overruled. These matters were referred to these various officers for their action and that leads up to the final action taken by the Secretary of War.

DISTRICT ATTORNEY: I now read in evidence the paper referred to, being endorsement No. 3 on Exhibit No. 3; being in words and figures as follows, to-wit:

"3d Indorsement.

U. S. ENGINEER OFFICE,
ROCK ISLAND, ILL., *Feb. 1, 1905.*

Respectfully returned to the Chief of Engineers, U. S. Army, attention being invited to report of this date, accompanying.

JAS L. LUSK,
Major, Corps of Engineers."

127 DISTRICT ATTORNEY: I now offer and read in evidence, from the papers marked "Government's Exhibit No. 4," the recommendation of Major Jas. L. Lusk to Brigadier General A. Mackenzie.

Mr. MINNIS: To which offer the counsel for the defendants object for the same reasons stated before, to-wit, that they are entitled to have the witness on the stand.

Objection overruled.

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

The District Attorney thereupon reads recommendation of Major Jas. L. Lusk to Brigadier General A. Mackenzie, which is in the words and figures following, to-wit:

128

UNITED STATES ENGINEER OFFICE,
UPPER MISSISSIPPI RIVER IMPROVEMENT,
ROCK ISLAND ILL., *February 1, 1905.*

Brig. Gen. A. Mackenzie, Chief of Engineers, U. S. Army, Washington, D. C.

GENERAL: 1. I have the honor to report as follows upon the accompanying petitions, addressed to the Secretary of War, and setting forth that the bridge over the Mississippi River at Hannibal, Mo., is an unreasonable obstruction to navigation.

2. The bridge complained of connects Hannibal, Mo., and East Hannibal, Ill., and is used for railway and highway purposes; it is understood to be the property of the Hannibal Bridge Company, and to be operated by one or more railway companies. It has fixed spans, and one drawspan with two openings, the whole supported by two abutments, six ordinary piers, and one pivot pier. With the exception of the abutment on the right or Missouri shore, which rests on rock, the piers and abutments are supported on piles, and are reinforced by considerable quantities of rip-rap, which has been added to from time to time. Up stream and down stream from the pivot pier extends a long or protection pier, terminated at each end by a crib pier. Going outwardly from the Missouri shore, the draw spans are respectively the second and third in order from that shore.

This bridge has no long fence or sheer boom to facilitate the passage of vessels through it, thereby differing conspicuously from all other railway bridges crossing the Mississippi river between St. Paul and the mouth of the Missouri river.

3. In 1892, Major (now General) A. Mackenzie, Corps of Engineers, fully investigated this matter, and after due public hearings reported that in his opinion the following changes were necessary in the interest of safe navigation:

"The west draw-pier (first pier from Missouri shore), is to be converted into a pivot pier; a new west draw-rest pier is to be constructed near the Missouri shore; the present pivot-pier is to be cut down and converted into an east draw-rest pier; the present draw-span is to be moved west; new and solid long or protection piers, of crib-work are to be built above and below the new pivot-pier; and proper guard fences are to be built along the Missouri shore above and below the new shore-pier.

Each of the draw-openings on the new location of draw-span is to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

The new and remodeled piers are to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible is to be given between all new and remodeled piers."

4. In July, 1892, the Chief of Engineers submitted the matter to the Secretary of War, concurring in the views of Major Mackenzie and recommending that notices be served on the companies owning, controlling or operating the bridge, to alter it as specified, the work to be completed by March 1, 1893.

5. The action of the War Department in the premises was as follows:

130

"WAR DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, Jan. 17, 1893.

"It appearing from the within papers that the Hannibal Bridge was constructed in the manner required by the act of Congress authorizing the same; that there have been no serious accidents to boats at this bridge during the past ten or twelve years; that there has been no general demand by the river interests for any change in the bridge, but that there is a difference of opinion among those largely interested in the navigation of the river as to the necessity or utility of the proposed changes; that complaints made of the bridge have been based upon *ex parte* statements, and that the proposed reconstruction of the bridge would involve a great expense to those owning or operating the same, without positive assurance of permanent advantage to river interests; no order will be made requiring the reconstruction or improvement of such bridge, the same not being an "unreasonable obstruction to the free navigation" of the river.

S. B. ELKINS,
Secretary of War."

6. Since the above quoted action of the War Department, in 1893, conditions are believed to have not greatly altered at this bridge, the only actual changes being those considered to be due to the deposit of rip-rap from time to time about some of the piers and abutments. It is possible that the unfavorable conditions at this bridge may be somewhat aggravated at future high stages by increased velocities due to the recent construction, by private interests, of a line of levee on the right (or Missouri) bank of the river, above the bridge. This levee extends down stream from the mouth of the South River, leaving the immediate bank of the river at a point some distance above the bridge.

7. From personal observation and experience, especially during the great flood of June, 1903, I am satisfied that this bridge
131 is an unreasonable obstruction to navigation, by reason of the wrong location of the draw-spans, the absence of guard fences or sheer booms, and the deposit of rip-rap in considerable quantities about the piers and abutments.

8. The changes I consider necessary in order that navigation through this bridge may be reasonably safe, easy and unobstructed, are the same as those recommended by Major Mackenzie and the Chief of Engineers in 1893, *i. e.*,—

"The west draw-pier (first pier from Missouri shore), is to be converted into a pivot-pier; a new west draw-rest pier is to be constructed near the Missouri shore; the present pivot-pier is to be cut down and converted into an east draw-rest pier; the present draw-span is to be moved west; new and solid long or protection piers, of crib-work are to be built above and below the new pivot-pier; and

proper guard fences are to be built along the Missouri shore above and below the new shore-pier.

"Each of the draw-openings on the new location of draw-span is to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 150 feet.

"The new and remodeled piers are to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible is to be given between all new and remodeled piers."

9. I consider one year from the date of giving notice a reasonable time to make the necessary changes, as that period will allow the owners of the bridge to utilize, for purposes of reconstruction, one season of low water and one season of closed navigation.

10. The character of this bridge as an unreasonable obstruction to navigation is so generally understood, and has been so well established by former hearings, that further hearings would appear to be superfluous; but, as the alteration of the structure so as to make it reasonably safe for navigation will be expensive, and on that account will probably be antagonized by its owners, I believe it would be best to hold another hearing, at which all parties in interest may be heard; the said new hearing to take place as soon as practicable.

11. Should the new hearing be ordered, I recommend that, to meet the necessary expenses, an allotment of \$300 be made, from the appropriation for "Examinations, Surveys and Contingencies of Rivers and Harbors."

12. Attention is invited to the blue-print herewith, which gives a general plan of the Mississippi river between the mouth of South river and Hannibal, and a profile illustrating the general character of the bridge.

Very respectfully, your obedient servant,

JAS. L. LUSK,
Major, Corps of Engineers."

133 DISTRICT ATTORNEY: I now offer and read in evidence, being a part of Government Exhibit No. 3, the recommendation of Brigadier General A. Mackenzie to the Secretary of War, concurring in the report and findings of Major Jas. L. Lusk, which are embodied in the document just now read, and recommending to the Secretary of War that a hearing be held.

MR. MIXNIS: We make the same objection to this offer, for the reasons before stated.

Objection overruled.

To which ruling the defendant, by their counsel then and there, at the time, duly excepted.

The District Attorney here reads the paper referred to. Said paper is in the words and figures following, to-wit:

"4th Indorsement.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *February 8, 1906.*

1. Respectfully returned to the Secretary of War.

2. Mr. John Killeen, Superintendent, Diamond Jo Line Steamers, incloses petitions of steamboat men and others for action requiring the alteration of the bridge of the Hannibal Bridge Company over Mississippi River at Hannibal, Mo., complained of as an obstruction to navigation.

134 3. The obstructive character of this bridge has heretofore been made the subject of consideration by the Department, the local officer in 1892 reporting it to be an unreasonable obstruction to navigation and recommending certain alterations therein but under date of January 17, 1893, the Secretary of War decided that no order will be made requiring the reconstruction or improvement of such bridge, the same not being an unreasonable obstruction to the free navigation of the river.

4. These papers have been referred to the local officer Maj. Jas. L. Lusk, Corps of Engineers, and attention is invited to his report in letter of February 1, 1905, herewith, in which he expresses the opinion that this bridge is an unreasonable obstruction to navigation by reason of the wrong location of the draw spans, the absence of guard fences or sheer booms and the deposit of rip-rap in considerable quantities about the piers and abutments. Certain changes as specified in paragraph 8 of his report are considered by him necessary in order that navigation through this bridge may be reasonably safe, easy, and unobstructed, and one year from the date of service of notice is deemed a reasonable time within which to make these changes.

5. I concur in the views of Major Lusk and recommend that the papers be returned to him with instructions to hold a public hearing as required by law and the orders of the War Department.

A. MACKENZIE.

Brig. Gen., Chief of Engineers, U. S. Army.

135 DISTRICT ATTORNEY: If the Court please, I offer in evidence the notices to the defendant companies, notifying them of the public hearing to be held at Rock Island.

Mr. MINNIS: We object to the notice because that is not the way to prove the service of notice, assuming that the notices were issued; in order for them to be considered in this case there would have to be some evidence that they were served. As I understand, the District Attorney intends to read a copy of a notice, and a copy of an affidavit that the notice was served. I don't think that would be proof of the service of the notice.

The COURT: How would you prove it? By some man who served it?

Mr. MINNIS: Yes, by the man who served it.

The COURT: Read your notice and then offer your service.

DISTRICT ATTORNEY: That was what I was trying to do.

The first notice is addressed to Col. Geo. A. Mahan, and is in the words and figures following, to-wit:

136 "To Geo. A. Mahan, Attorney, Hannibal Bridge Company:

Whereas, the Secretary of War has good reason to believe that the bridge over the Mississippi River at Hannibal, Mo., commonly known as the Wabash Railway bridge, is an unreasonable obstruction to the free navigation of the Mississippi River on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers,

It is proposed to require the following changes to be made in said bridge by the first day of July, 1906, to-wit: As per attached slip.

"The west draw pier (first pier from Missouri shore), to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot-pier; and proper guard fences to be built along the Missouri shore above and below the new shore pier.

"Each of the draw openings on the new location of draw span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

"The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers."

In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, in Room 28, at U. S. Engineer Office, Post Office Bldg., 16th St. & 2d Ave., in Rock Island, Ill. at 10 o'clock a. m. on the Sixth day of June, 1905, where and when

137 you will be given an opportunity to be heard in the matter.

As all the papers will be laid before the Secretary of War for his decision it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War.

C. S. RICHE,
Major, Corps of Engineers."

Which said notice bears on the back the following endorsement:

"Notice of Hearing.

COUNTY OF ROCK ISLAND,

State of Illinois, ss:

A. L. Richards being duly sworn, on his oath states that he made service of the within on The Hannibal Bridge Company, by personally delivering a copy thereof to Mr. Geo. A. Mahan, Attorney of said company at Hannibal, Mo. on the 10th day of May, 1905.

Subscribed and sworn to this 12th day of May, 1905, *be* before me.

[SEAL.]

C. R. CHAMBERLAIN,
Notary Public."

138 DISTRICT ATTORNEY: The second notice is addressed to Mr. Alexander M. White, being a certified copy of the original document at Washington.

The paper referred to is in the words and figures following to-wit:

"To Alexander M. White, Pres't Hannibal Bridge Company:

Whereas, the Secretary of War has good reason to believe that the bridge over the Mississippi river at Hannibal, Mo., commonly known as the Wabash Railway bridge, is an unreasonable obstruction to the free navigation of the Mississippi River on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers.

It is proposed to require the following changes to be made in said bridge by the first day of July, 1906, to-wit: (As per attached slip.)

"The west draw-pier (first pier from Missouri shore), to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot-pier; and proper guard fences to be built along the Missouri shore above and below the new shore-pier.

"Each of the draw-openings on the new location of draw span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

"The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers."

139 In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, in Room 28, at U. S. Engineer Office, Post Office Bldg., 16th St. & 2d Ave., in Rock Island, Ill., at 10 o'clock a. m., on the Sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War:

C. S. RICHE,
Major, Corps of Engineers."

Which said notice bears on the back the following endorsement:

"Notice of Hearing."

STATE OF NEW YORK,
County of New York, ss:

William Daly, being duly sworn, on his oath, states that he made service of the within on The Hannibal Bridge Company, by personally delivering a copy thereof to Mr. Alfred T. White, Sec'y, who accepted service for Mr. Alexander M. White, President, (who is ill) of said company at New York City on the 12th day of May, 1905.

WILLIAM DALY.

140 Subscribed and sworn to this 12th day of May, 1905 before
me.

[SEAL.]

WILLIAM J. TATE,
Notary Public, County of Kings, N. Y.

Certificate filed in New York County."

Mr. MOFFAT: I would like to state on behalf of the Hannibal Bridge Company that we raise no question whatever as to the receipt of this notice just read.

141 DISTRICT ATTORNEY: The third notice is addressed to Alfred T. White, being a certified copy of the original document at Washington.

The paper referred to is in the words and figures following, to-wit:

"To Alfred T. White, Secretary Hannibal Bridge Company:

Whereas, the Secretary of War has good reason to believe that the bridge over the Mississippi River at Hannibal, Mo., commonly known as the Wabash Railway bridge, is an unreasonable obstruction to the free navigation of the Mississippi River on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers.

It is proposed to require the following changes to be made in said bridge by the first day of July, 1906, to-wit: (as per attached slip.)

"The west draw-pier (first pier from Missouri shore), to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west new and solid long or protection piers, or crib-work to be built above and below the new pivot-pier; and proper guard fences to be built along the Missouri shore above and below the new shore-pier.

"Each of the draw-openings on the new location of draw span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

"The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers."

In order to give you an opportunity to be heard as required
 142 by the Act of Congress approved March 3, 1899, you are
 hereby notified that a hearing will be had before me, in Room
 28, at U. S. Engineer Office, Post Office Bldg., 16th St. & 2d Ave., in
 Rock Island, Ill., at 10 o'clock a. m. on the Sixth day of June, 1905,
 where and when you will be given an opportunity to be heard in the
 matter. As all the papers will be laid before the Secretary of War
 for his decision it will perhaps best suit your purpose to submit in
 writing whatever you may wish to present.

By authority of the Secretary of War:

C. S. RICHE,

Major, Corps of Engineers."

Which said notice bears upon the back the following endorsement:

"Notice of Hearing.

STATE OF NEW YORK,

County of New York, ss:

William Daly, being duly sworn, on his oath, states that he made
 service of the within on the Hannibal Bridge Company, by person-
 ally delivering a copy thereof to Mr. Alfred T. White, Secretary of
 said company at No. 130 Water St., New York City on the 12th day
 of May, 1905.

WILLIAM DALY.

Subscribed and sworn to this 12th day of May, 1905, before me.

[SEAL.]

WILLIAM J. TATE,

Notary Public, County of Kings, N. Y.

Certificate filed in New York County."

143 DISTRICT ATTORNEY: The fourth notice is addressed to
 A. R. Levering, Director, Hannibal Bridge Company, being
 a certified copy of the original document at Washington.

The paper referred to is in words and figures following, to-wit:

To A. R. Levering, Director, Hannibal Bridge Company:

Whereas, the Secretary of War has good reason to believe that the
 bridge over the Mississippi River at Hannibal, Mo., commonly
 known as the Wabash Railway bridge, is an unreasonable obstruction
 to the free navigation of the Mississippi River on account of unsuit-
 able location of the draw spans and protection crib, the lack of suit-
 able guard fences or sheer booms, and the presence of obstructing
 rip-rap around the piers.

It is proposed to require the following changes to be made in said
 bridge by the first day of July, 1906, to-wit: (As per attached slip.)

"The west draw-pier (first pier from Missouri shore), to be con-
 verted into a pivot-pier; a new draw-rest pier to be constructed near
 the Missouri shore; the present pivot-pier to be cut down and con-
 verted into an east draw-rest pier; the present draw-span to be moved

west; new and solid long or protection piers, of crib-work to be built above and below the new pivot-pier; and proper guard fences to be built along the Missouri shore above and below the new shore-pier.

"Each of the draw-openings on the new location of draw span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

"The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers."

144 In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, in Room 28, at U. S. Engineer Office, Post Office Bldg., 16th St. & 2d Ave., in Rock Island, Ill., at 10 o'clock a. m., on the Sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision, it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War:

C. S. RICHE,
Major, Corps of Engineers."

And is endorsed on the back as follows:

"Notice of Hearing.

COUNTY OF ROCK ISLAND,
State of Illinois, ss:

A. L. Richards, being duly sworn, on his oath, states that he made service of the within on Hannibal Bridge Company, personally delivering a copy thereof to Mr. A. R. Levering, Director of said company at Hannibal, Mo., on the 10th day of May, 1905.

Subscribed and sworn to this 12th day of May, 1905, before me.

[SEAL.]

C. R. CHAMBERLAIN,
Notary Public.

145 DISTRICT ATTORNEY: The fifth notice is addressed to Mr. W. H. Blodgett, being a certified copy of the original document at Washington.

The paper referred to is in the words and figures following, to-wit:

"To W. H. Blodgett, Vice-President, Wabash Railway Company:

Whereas, the Secretary of War has good reason to believe that the bridge over the Mississippi River at Hannibal, Mo., commonly known as the Wabash Railway bridge, is an unreasonable obstruction to the free navigation of the Mississippi River on account of unsuitable location of the draw spans and protection crib, the lack of suitable

guard fences or sheer booms, and the presence of obstructing rip-rap around the piers.

It is proposed to require the following changes to be made in said bridge by the first day of July, 1906, to-wit: (As per attached slip)

"The west draw-pier (first pier from Missouri shore), to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot-pier; the proper guard fences to be built along the Missouri shore above and below the new shore-pier.

"Each of the draw-openings on the new location of draw span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

"The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers."

146 In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, in Room 28, at U. S. Engineer Office, Post Office Bldg., 16th St. & 2d Ave., in Rock Island, Ill., at 10 o'clock a. m., on the Sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision, it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War:

C. S. RICHE,
Major, Corps of Engineers.

And is endorsed on the back, as follows:

"Notice of Hearing.

CITY OF ST. LOUIS,
State of Missouri, ss:

W. M. Williamson being duly sworn, on his oath, states that he made service of the within on The Wabash Railway Company by personally delivering a copy thereof to W. H. Blodgett, Vice-President of said company at St. Louis, Mo., on the 18th day of May, 1905.

Subscribed and sworn to this 18th day of May, 1905, before me.
My term expires Aug. 21, 1905.

[SEAL.]

CAROLINE L. WEBER,
Notary Public."

147 DISTRICT ATTORNEY: The sixth notice is addressed to Mr. W. S. Newhall, being a certified copy of the original document at Washington.

The paper referred to is in the words and figures following, to-wit:

"To W. S. Newhall, Chief Engineer, Wabash Railway Company:

Whereas, the Secretary of War has good reason to believe that the bridge over the Mississippi River at Hannibal, Mo., commonly known as the Wabash Railway bridge, is an unreasonable obstruction to the free navigation of the Mississippi River on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers.

It is proposed to require the following changes to be made in said bridge by the first day of July, 1905, to-wit: (as per attached slip.)

"The west draw-pier (first pier from Missouri shore), to be converted into a pivot pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot-pier; the proper guard fences to be built along the Missouri shore above and below the new shore pier.

"Each of the draw-openings on the new location of draw span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

"The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers."

148 In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, in Room 28, at U. S. Engineer Office, Post Office Bldg., 16th St. & 2d Ave., in Rock Island, Ill., at 10 o'clock a. m., on the Sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War:

C. S. RICHE,
Major, Corps of Engineers."

And which said notice is endorsed on the back as follows, to-wit:

"Notice of Hearing.

CITY OF ST. LOUIS,
State of Missouri, ss:

W. M. Williamson, being duly sworn, on his oath, states that he made service of the within on The Wabash Railway Company by

personally delivering a copy thereof to W. S. Newhall, Chief Engineer of said company at St. Louis, Mo., on the 9th day of May, 1905.

Subscribed and sworn to this 18th day of May, 1905, before me.
My term expires Aug. 21, 1905.

[SEAL.]

CAROLINE L. WEBER,
Notary Public."

149 DISTRICT ATTORNEY: The seventh notice is addressed to Mr. Geo. J. Gould, General Manager, Missouri Pacific and Wabash Railways, being a certified copy of the original document at Washington.

The paper referred to is in the words and figures following, to-wit:

"To Geo. J. Gould, Gen'l Mgr., Missouri Pacific and Wabash Railways:

Whereas, the Secretary of War has good reason to believe that the bridge over the Mississippi River at Hannibal, Mo., commonly known as the Wabash Railway Bridge, is an unreasonable obstruction to the free navigation of the Mississippi River on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing riprap around the piers.

It is proposed to require the following changes to be made in said bridge by the first day of July, 1906, to-wit: (as per attached slip.)

"The west draw-pier (first pier from Missouri shore), to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot-pier; the proper guard fences to be built along the Missouri shore above and below the new shore-pier.

"Each of the draw-openings on the new location of draw span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

150 "The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers."

In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, in Room 28, at U. S. Engineer Office, Post Office Bldg., 16th St. & 2d Ave., in Rock Island, Ill., at 10 o'clock, a. m., on the Sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision, it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War:

C. S. RICHE,
Major, Corps of Engineers."

And which said paper, bears on its back the following endorsement:

Notice of Hearing.

STATE OF NEW YORK,

County of New York, ss:

Wm. H. Harden, being duly sworn, on his oath, states that he made service of the within on Missouri Pacific and Wabash Railways, by personally delivering a copy thereof to George J. Gould, General Manager of said companies, at New York, on the 23rd day of May, 1905.

WM. H. HARDEN.

151 Subscribed and sworn to this 23rd day of May, 1905, before me.

WILLIAM J. TATE,

[SEAL.]

Notary Public, County of Kings, N. Y.

Certificate filed in New York County."

Mr. MINNIS: I object to the admission of this affidavit, on the ground that it is not proper proof of service, being an affidavit, and not having the officer present who made the service.

The COURT: The objection is overruled. Anybody can make the service, whether an officer or an individual.

To which ruling the defendants, by their counsel, then and there, duly excepted.

DISTRICT ATTORNEY: The eighth notice is addressed to Mr. M. L. Byers, being a certified copy of the original document at Washington—

Mr. HERBEL: That is objected to for the same reasons before stated, and for the further reason that it does not appear from the notice here, or any other proof, who M. L. Byers was, or what position he occupied with the Missouri Pacific Railway Company, or that he was the proper officer on whom to serve a notice of that character.

The COURT: The objection is overruled.

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

The paper referred to is in the words and figures following, to-wit:

152 "To M. L. Byers, Chief Engineer, Missouri Pacific Railway Company:

Whereas, the Secretary of War has good reason to believe that the bridge over the Mississippi River at Hannibal, Mo., commonly known as the Wabash Railway bridge, is an unreasonable obstruction to the free navigation of the Mississippi River on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers.

It is proposed to require the following changes to be made in said bridge by the first day of July, 1906, to-wit:

(As per attached slip).

"The west draw-per (first pier from Missouri shore), to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot-pier; the proper guard fences to be built along the Missouri shore above and below the new shore-pier.

"Each of the draw-openings on the new location of draw span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

"The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers."

In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, in Room 28, at U. S. 153 Engineer Office, Post Office Bldg., 16th St. & 2d Ave., in Rock Island, Ill., at 10 o'clock a. m., on the Sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision, it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War:

C. S. RICHE,
Major, Corps of Engineers."

Which paper bears on the back the following endorsement:

"Notice of Hearing.

CITY OF ST. LOUIS,
State of Missouri, ss:

W. M. Williamson, being duly sworn, on this oath, states that he made service of the within on Missouri Pacific Railway Company, by personally delivering a copy thereof to M. L. Byers, Engineer, Maintenance of Way, of said company at St. Louis, Mo., on the 18th day of May, 1905.

Subscribed and sworn to this 18th day of May, 1905, before me.
My term expires Aug. 21, 1905.

[SEAL.]

CAROLINE L. WEBER,
Notary Public."

154 DISTRICT ATTORNEY: I next offer in evidence and read the report dated January 12, 1906, of Captain C. W. Durham to Major C. S. Riche, recommending the changes in the bridge that had been specified in the report of Major A. Mackenzie.

The paper referred to is in the words and figures following, to-wit:

UNITED STATES ENGINEER OFFICE,
 ROCK ISLAND, ILL., Jan. 12, 1906.

Major C. S. Riche, Corps of Engineers, U. S. Army, Rock Island, Ill.

MAJOR: 1. As verbally instructed by you, I have the honor to present the following report on the Hannibal Bridge case:

On February 13, 1905, by indorsement on a letter of the Diamond Jo Line of Steamers, by its superintendent, Captain John Killeen, dated January 2, 1905 (E. D. 47489/11, said letter complaining of the bridge over the Mississippi River at Hannibal, Mo., as a very dangerous obstruction to navigation, and being accompanied by three petitions (E. D. 47489/12/13/14) to the same effect, numerous signed by vessel owners, masters, pilots and others interested in the navigation of the upper Mississippi River, Major Jas. L. Lusk, Corps of Engineers, then in charge of this office, was instructed to investigate the conditions of the Hannibal bridge, and to hold a public hearing as required by law and the orders of the War Department. On the relief of Major Lusk from the charge of this district, April 1, 1905, this duty devolved on you.

155 2. Major Lusk's letter of February 1, 1905, to the Chief of Engineers, (E. D. 47489/19), with accompanying map (47489/20) is a report upon the letter and petitions above mentioned, and gives a general description of the bridge, mentions a former investigation of the matter in 1892, states briefly the opinion of the officer then in charge (E. D. 2553-1892) and the action of the War Department in the premises. In this report Major Lusk also states that he considers the bridge an unreasonable obstruction to navigation and recommends the same changes as were advocated by Major Mackenzie in 1892, which proposed changes are described in full farther on.

3. There accompany this report, the abstract of evidence, brief and argument on behalf of the Diamond Jo Line of Steamers by its attorneys, Hughes and Sawyer (Doc. 1), and the abstract of evidence, statement, brief and agreement on behalf of the Hannibal Bridge and Wabash Railroad companies, by their attorney, Geo. A. Mahan (Doc. 2). These documents give a full statement of the case and the circumstances leading up to it, abstracts of the evidences,—both written and oral, a statement of facts and argument.

4. June 6, 1905, having been selected as a suitable date for the public hearing, a notice to that effect was given two insertions in the *Pioneer Press*, of St. Paul, Minn., the *Globe Democrat*, of St. Louis, Mo., the *Waterways Journal*, of St. Louis, Mo., and the *Courier Post* and the *Journal*, of Hannibal, Mo., as follows:

Public Hearing, U. S. Engineer Office, Rock Island, Ill., May 6, 1905.

Notice is hereby given that, whereas the Secretary of War has good reasons to believe that the so-called Wabash Railway bridge over the Mississippi River at Hannibal, Mo., is an unreasonable obstruction to free navigation, a public hearing in the matter will be held here at

10 a. m., June 6, 1905. Persons and corporations interested are invited to attend.

C. S. RICHE,
Major, Eng'rs.

156 Notices of hearing on the form prescribed by the War Department were personally served, as shown by sworn copies herewith, on the following named persons, representing all the companies owning, controlling or operating the Hannibal Bridge, viz.: Geo. A. Mahan, Attorney; Alexander M. White, President; Alfred T. White, Secretary, and A. R. Levering, Director, of the Hannibal Bridge Co., and Geo. J. Gould, General Manager; W. H. Blodgett, Vice President, and W. S. Newhall, Chief Engineer, of the Wabash Railway Co., and Geo. J. Gould, General Manager, and M. L. Byers, Engineer Maintenance of Way, of the Missouri Pacific Railway Co.

These notices state the reasons for believing the bridge an unreasonable obstruction to navigation, the changes required, and the date at which such changes should be completed (Doc. 3). *It is believed that the above mentioned notices and advertisement show that the law and the orders of the department have been fully complied with as regards the public hearing.*

5. On March 25, 1905, a circular was sent to all pilots, masters and owners of steamboats whose addresses were known, stating that petitions and letters have been received complaining of the Hannibal bridge as an unreasonable obstruction to navigation, stating also what appeared to be the prevailing opinion of navigators as to the remedy and requesting an answer to certain questions. Copies of this circular and of all the replies received are herewith (Doc. 4). Of the thirty-one replies, twenty-eight were from well-known pilots and masters of steamboats, two from large steamboat owners, and one from a steamboat clerk.

6. The public hearing was held on June 6, 1905, at the U. S. Engineer Office in Rock Island, Ill., a full stenographic report of which is herewith (Doc. 5.) The number present at the

157 meeting, which was smaller than expected, comprised the following persons.

Major C. S. Riche, Corps of Engineers; Presiding.

M. Meigs, U. S. Civil Engineer; in local charge of improvements in the section of river in which the bridge is located.

Washington Hight, Master and Pilot.

Campbell Hunt, Pilot U. S. Steamer Lily.

George Lamont, Master.

Geo. Ad Mahan, Attorney for Hannibal Bridge Co.

Richards A. Hayes, representing stockholders of the Hannibal Bridge Co.

T. M. Strain, representing Hannibal Bridge Co.

A. O. Cunningham, Bridge Engineer, Wabash Railway Co.

At this hearing the complaint of the Diamond Jo Line of Steamers, with its indorsements, was read (E. D. 47489/11), as also Major Lusk's report (E. D. 47489/19). Replies to Major Lusk's circular of March 25, 1905 (Doc. 4) were also read, and statements were

made by Captain Washington Hight, Mr. M. Meigs, Mr. Geo. A. Mahan, and Mr. T. M. Strain. Mr. Mahan at this meeting presented a large number of affidavits, with a protest against changing Hannibal R. R. bridge (Doc. 6) and an affidavit of T. M. Strain, with two blue prints (Doc. 7). Affidavits later submitted were those of H. W. Parkhurst, Civil Engineer; Elmer L. Corthell, Civil Engineer; Jas. W. Leach, Watchman on bridge; Andrew O. Cunningham, Chief Engineer Wabash Railway Co., Edward Shelah, Engineer Maintenance Wabash Railway Co., and Geo. E. Francisco, bridge tender (Doc. 8). Doc. 6, the protest above referred to, covers affidavits of Edward G. Webb, foreman; Jno. L. Cruikshank, lumber dealer; Geo. W. Dulaney, lumber dealer; N. L. Saunders, fisherman; Wm. Groves, fisherman, Thomas B. Loudon, owner of small steamboat; Charles W. Curtis, pilot; Wm. L. Pound, railroad engineer J. C. Shaw, railroad engineer; Albert F. Becker, bridge engineer, Patrick Sullivan, bridge laborer, Jas. B. Culbertson, bridge superintendent, John J. Conlon, lumber dealer; Wm. T. Williamson, ferryboat engineer; George F. Morris, Captain of ferryboat; Monte 158 C. Van Houten fireman, of ferryboat; John Kizer, deck hand, and A. R. Levering, director Hannibal Bridge Co. The important testimony and statement as well as additional matter contained in the documents above mentioned, are printed at length in the briefs of the attorneys.

7. The affidavits submitted on the side of the steamboat men are those of J. T. Smith, pilot; A. G. Ames, master and pilot; Jesse D. Mefford, master & pilot; Edward Mead, steamboat engineer; T. S. Adams, steamboat owner; Wm. Mills, master & pilot; L. R. Williams, pilot; Richard Eagleson, pilot; J. H. Laycock, master & pilot; W. T. Chambers, steamboat engineer; John R. Carpenter, superintendent improvement work; B. C. Davis, steamboat mate; Chas. P. Martin, pilot, and Wm. Burke, master (Doc. 9). Additional affidavits for the steamboat men are those of W. A. Storrs, merchant; C. A. Pennoyer, steamboat agent; Robert A. Curtis, farmer; S. M. Conrad, riverman; Will A. Dickason, riverman; Thomas C. Lippencott, steamboat engineer and W. A. Munger, manufacturer and farmer (Doc. 10). There are also three reports of M. Meigs (Doc. 11), a number of photographs showing type of boats using Hannibal bridge (Doc. 12), two profiles (blue prints) of Hannibal bridge (Doc. 13), a statement of the Department of Commerce and Labor (Doc. 14), and the authority of Mr. Mahan to represent the Hannibal Bridge and Wabash Railway Companies (Doc. 15).

8. In reviewing the brief of Attorney Geo. A. Mahan (Doc. 2), I find on the first page, in par. 3, a statement that from 1884 to 1903 "not a single life was lost nor any property destroyed." While it may be true that no life was lost, it is reasonably certain that many accidents occurred during that period, and that much property was destroyed. The reports of the Department of Commerce and Labor (the steamboat inspection service) are necessarily incomplete, as small accidents are seldom or never reported. No accident prior to 1872 is reported, and only eight from April 3, 1872, to June 26,

1883, (Doc. 14), involving, however, a loss of 12 lives and \$38,575.00 in money, the steamboats mentioned being the Red Wing, Savannah, J. H. Johnston, Dictator, Clinton, Rob Roy, Little Eagle, and Centennial. The records of this office, from information given by pilots, show, however, that in addition to the list above given, considerable damage was done to the Diamond Jo (barge lost), Lumberman (barge lost), Susie Silver, Minneapolis, Gem City, Dubuque, U. S. Octavia, Harry Johnson, Lake Superior, Tom Jasper, War Eagle, North Western, Andy Johnson, Col. Patterson (barge lost), D. A. McDonald, Josephine (barge lost), besides numberless collisions resulting in more or less damage to rafts. While the years in which these accidents happened cannot be given, it is known that many of them happened between 1884 and 1903. As the bridge conditions, although somewhat changed for the worse by additional rip-rap work thrown in around the piers, are practically the same as when the bridge was built, all of these accidents should be considered. The statement (page 2, par. 1) that the accident to the Flying Eagle was due to the carelessness and negligence of the officers, four lives being lost, does not appear warranted by the evidence. The affidavit shown on pages 4-11 were not presented at this time, but are presumably copies of affidavits filed at the hearing in 1892. It may be said of the first affidavit (that of the lumbermen) that nearly all the logs used by these firms was dropped in strings or small pieces through the west shore span by a little steamboat, the Harry Reid, and that it was manifestly to their interest that the width of that span should not be lessened. The president of the Empire Lumber Co.—which is the chief factor in the affidavit, in writing to Major Mackenzie under date of April 7, 1892, says that—

"We do not think the Harry Reid a fair comparison with other larger tow or raft boats. The Harry Reid is a smaller boat than most other raft or tow boats and passes *under the spans* of the bridge in low and medium stages of low water. She rarely tows anything through the bridge going up stream and in towing down lumber and logs her pieces or rafts are not so large as other rafts."

And in another letter—

"Our river is very high. A few days ago we had a tow-boat strike the bridge with a raft of logs breaking up the raft and causing right smart loss."

It may here be said that the manufacture of lumber, etc., from logs at Hannibal has now practically ceased; that the lumber firms deal almost exclusively in manufactured lumber and that a comparatively small amount of such lumber is annually passed through the bridge. As regards the affidavit of Wm. H. Beard (page 5), who was captain and pilot of the little towboat Harry Reid (85 x 18 feet,) it may be said that Captain Beard was at the time in the employ of the lumber companies and his testimony is manifestly in their interest. But in a letter to Major Mackenzie, in 1892, he says—

"It is a dangerous bridge to run in high water; if there is any change to be made, the draw should be moved to the west shore. I am in favor of moving the draw to the west shore."

Neither Loudon or John S. Clark are pilots, but were employed on the little towboat Harry Reid, which was engaged in dropping small pieces through the west span.

The following affidavits of Chas. W. Clark (ex. M. C.), Dan. L. Haffner, owner of a little ferryboat, A. R. Levering, a banker, and W. S. Lincoln,—then Chief Engineer of the Wabash Ry. Co. (pages 7-11), are of persons who are not shown to have been familiar

161 with the question of navigating the draw of the Hannibal bridge at high stages of the river. On page 16 the statement is made that the answers to the pilot's circular (Doc. 4) of this office are of no value, whereas, they are, in my opinion, of the utmost value, as coming from reputable men who have intimate and practical knowledge of the matter in question. Nor does there appear reasons for the statement, also made on page 16, that rivermen have continually objected to bridges, for since the Hannibal bridge was built there have been twenty-six bridges constructed across the Mississippi River above the mouth of the Missouri River under supervision of this office, and in no case do the records show opposition on the part of steamboatmen or owners of steamboats to the building of these bridges. Of the opinions given at this time, in reply to Major Lusk's circular (thirty-one in number), twenty-eight are of pilots and masters, who are, in my opinion, the men best qualified to speak of the matter in hand, as all of them have for years navigated in the vicinity of Hannibal bridge. In answer to this 1892 circular, Major Mackenzie received, in addition to the twenty-eight above mentioned, sixty-nine replies, all of which were of the same tenor as the foregoing and all from pilot- and masters of great experience, most of whom are now dead or retired from the river. On page 19, par. 1, Mr. Mahan states that "Many of these men have no connection with piloting on the river and know nothing about currents or bridge obstructions." This statement is unwarranted, as all but three are

162 well known pilots and masters, mostly of large boats, and two of the three are owners of many steamboats. The best pilots on the river are in the list, and their statements are the best possible evidence as to the dangerous character of the Hannibal Bridge. As regards the affidavits, 26 in number, of the Hannibal Bridge Co. (Docs. 6, 7, & 8, pages 27-45), there is only one reputable pilot. The others who made affidavits comprise these lumbermen, two fishermen, one owner of small towboat, two railroad engineers (who hold a local pilot's license for boats not exceeding ten tons), one Hannibal Bridge Superintendent, one foreman (Hannibal Bridge), one Hannibal Bridge laborer, one small ferry boat owner, one small ferry boat captain, one fireman, one deckhand, one banker, (director of the Hannibal Bridge Co.) one civil engineer in the employ of the Hannibal Bridge Co., two civil engineers (who assisted in its construction), one watchman on bridge, one clerk, and the Chief Engineer and Engineer of Maintenance of the Wabash Ry. Co. None of the above is thought to have the knowledge requisite for giving expert testimony as to dangers of the bridge, and many of them are now or have been directly interested in the bridge itself or its management, or in the use of the west span, which

it is proposed to make narrower. Referring to the affidavit of T. M. Strain, Civil Engineer in charge of the Hannibal Bridge (page 39,) and to the accompanying maps (as to the correctness of which he testifies,—Doc. 7), it would appear that the bridge is not a legal structure as regards clear width of draw-span, due in part to rip-rap obstructions. Careful measurements on his profile show the following:

163	Measurements.	East draw span.	West draw span.
		<i>Feet.</i>	<i>Feet.</i>
	Clear width at top.....	157.5	157.5
	Clear width at high water.....	156.5	156.5
	Clear width at stage 11.5.....	155.5	155.5
	Clear width at low water	151.5	146.5
	Clear width at 3 feet below low water.....	140.0	134.0
	Clear width at 4½ feet below low water.....	135.0	132.0

The law calls for a clear width of 160 feet, and it is fair, to assume that this clear width should extend at least to low water, if not lower down. It is plain that the rip-rap rock thrown in around the piers diminishes the clear width at low stages. The affidavit of A. O. Cunningham, Chief Engineer of the Wabash Railway Co. (page 43), indicates that the bridge is an illegal structure, as according to his statement, the rip-rap comes up to 2.5 feet above low water, thereby materially diminishing the clear width at that stage; and the affidavit of Edward Shelah (pages 43 and 44), Engineer Maintenance of Way, of the Wabash Railway, has precisely the same effect. Of the eight affidavits for the steamboatmen (pages 45-48), only that of Wm. Mills, who is now employed as master and pilot by the U. S., is considered important, and that is to the effect that the bridge is very dangerous at high water. On page 48—accidents at the Hannibal bridge—the report of the Department of Commerce and Labor actually states (Doc. 14), although here omitted, that on investigation it was shown the *accidents to the Dictator, Clinton and Rob Roy were caused by cross currents in the draw of the bridge*. Mr. Meigs' statement (page 49) also tends to show that the bridge is an illegal structure, in that the west draw opening is but 158.3 feet in the clear and the east opening 157.3 feet. These were actual measure-

164 ments made in 1905 at a tolerably high stage. As regards page 51, paragraphs 2, 3 & 4, there is no doubt that the preliminary examinations for the location of the Hannibal bridge were made at low stages of the river, at which time the current is gentle, but as regards the conditions at high water after the bridge was built and today, the facts are different, due in part to the building of the piers, the placing of rip-rap in the channel around the piers, and the faulty construction of the draw crib. Page 52, Par. 2: It may here be said that much additional rip-rap has been thrown in around the piers from time to time, so that it projects 2.5 feet above low

water and diminishes the clear width materially at that stage; Par. 3: The statement in regard to accidents is misleading, as the report of the Department of Commerce and Labor does not pretend to be complete, and the records of this office show a large number of additional accidents. It is, moreover, true that many accidents have probably been avoided by care and by not running the bridge at night. In par. 4 it is stated that without exception everyone of the accidents occurred during very high water, whereas the ga-gage records of this office, which do not extend further back than 1878, show that,—in regard to the two boats damaged in 1883, the Little Eagle April 23 and the Centennial June 26—the stages were 9.7 and 13.6, respectively. The stage 9.7 is not considered high, and yet the Little Eagle was wrecked at that stage, with a loss of three lives. Nor is 13.6 very high. That the accidents were all due to carelessness, as is stated,

is manifestly an error, as an official investigation made at the 165 time demonstrated that the accidents to three of the eight boats named were due to cross currents in the draw, and it is probably that if investigation had been made as to the other accidents the same reason would have been found.

Page 53, paragraphs 1 & 2; it has not been proved that the accident to the Flying Eagle was due, as is stated, to carelessness and negligence, but it is almost certain that the accident would not have occurred had not the current been made abnormally swift and crooked by the existence of the piers and rip-rap. On page 55, par. 3, is an erroneous statement that the steamboat men have objected to and fought all bridges across the Mississippi River.

Page 57: Attention has already been given to the many errors on this page. Page 58, par. 1, is wholly erroneous as applied to the upper Mississippi River, as is also the statement in par. 3, because at the time the bridge was built there were not as many boats as now, and not as much freight, if lumber and logs be taken into consideration, and, furthermore, the boats of today are of much larger size than then. On page 62, par. 1, is a quotation from General Warren's report on Bridging the Mississippi River, which report was made in 1878 from surveys of 1876. Although this report was made many years ago and before bridging this river was as well understood as now, the quoted remarks are excellent, and are equally true today. But the Hannibal Bridge does not follow General Warren's rule, as the draw is not on the shore and the channel is not straight above

the bridge except for about one thousand feet. There are 166 cross currents in the draw, and the current at high water is so swift that boats cannot readily stem it going up stream, so that some of the worst accidents have happened to boats going up stream. By moving the draw to the west the velocity of the current would be much less. There need be no special difficulty in locating the draw on the shore, even where the range is greater than twenty feet. In fact, many of the bridges across the upper Mississippi River are built under similar conditions. It would appear that this whole quotation is a strong argument against the Hannibal bridge as it now exists. When the act authorizing the Hannibal bridge was passed, there were in existence but three bridges across the Missis-

issippi River between the Missouri River and St. Paul,—the Wabash Street high bridge at St. Paul, the Clinton bridge, and the old Rock Island bridge. None of these bridges was authorized by Congress, although the Clinton bridge was legalized by Congress in 1867. The St. Paul high bridge never was an obstruction, and the old Rock Island bridge, which was very dangerous, was removed. When General Warren made his report there were twelve bridges,—there are now thirty-six.

General Warren says of the Hannibal bridge (page 1017) that—
 “At high water the velocity is so strong that boats of small power cannot stem it. At such time it is a very dangerous obstruction, because the draw is located in the swiftest current, needing only a small accident to machinery, or a single turn of the wheel too much, to cause a serious accident.”

The first bridge act for the upper Mississippi River that was passed by Congress, was in 1866, it being an omnibus act in which Hannibal was included. Not much was known at that time of the effect of bridges across the Mississippi River, and there was
 167 little or no government supervision. On June 4, 1872, an act was passed applying to all future bridges and placing construction under the supervision of the Secretary of War.

On page 62, par. 3, the statement is erroneous; commenting on par. 4, while the act requires the draw to be over the main channel, it does not say the *center* of the main channel; if the draw were moved to the west, as proposed, it would still be over the main channel; and, again, the main channel may mean the principal one of two or more chutes; and, further, the main channel in this section of the river, as located by the U. S. Engineer Department, is 1300 feet wide. In the location of draw bridges under acts subsequent to the act of 1866, locations have been sought where the channel ran close to the shore, so that there should be no long span between draw and shore, as in the cases of the Kansas City bridge at St. Paul, the St. Paul Park, La Crosse Railway, La Crosse Wagon, Winona, Eagle Point, Sabula, Fort Madison and Louisiana bridges. At Rock Island, Keokuk, Keithsburg and Alton the draws were placed near shore, but not over the deepest water.

The act of 1866 authorized 7 bridges, viz: at Winona, McGregor, Dubuque, Burlington, Keokuk, Quincy and Hannibal. At Winona there is no raft span on the west side and the draw is near the shore; at McGregor (ponton) there is no raft span and the draw is near the shore; at Dubuque there are two raft spans, but the eastern one was never used, and, being over shallow water with slack current, there is no difficulty in holding a sheer boom extending from the east draw pier to the shore above; at Burlington there is no raft span on the
 west side and the draw is near shore; at Keokuk there is no

168 raft span on the west side and the draw is near the shore; at Quincy there are two raft spans, but the western one was never used because of shoal water in about half of its width permitting a suitable sheer-boom to guide craft into the west draw span; at Hannibal there are two raft spans,—that on the west having been much used, but on account of the swift current at high water, the

depth, and the distance from the shore of the west draw pier, it has been thought *impracticable* to connect that pier with the shore above by a suitable sheer boom or guide fence. It thus appears that all of the bridges built under the act of 1865, except that at Hannibal, are properly located, and since the installation of sheer booms and guide fences, as required by Sec. 8 of the River & Harbor Act of July 5, 1884, have offered no serious obstruction to navigation.

On page 63, the last paragraph is in error. This span would be navigable at all stages for its full width after dredging the loose rock thrown in by the railway company as is shown on profiles (Doc. 13).

Page 64, last paragraph: The quotation from General Warren's report is incomplete. What he does say is—

"Experience on the Upper Mississippi has shown that the proper site for a bridge is where the channel is straight and next to the bank of both high and low water. The channel spans, whether low draw or high fixed ones, would then be next the bank which at all times would furnish the best guide for the pilot; and then the further reason that the side next the shore can be protected by piling or other means that will allow the vessels to rub against it in safety. . . . Such locations cannot readily be made where the rise of the river from low to high water much exceeds 20 feet, because the necessary slope of the bank will require an open span between the margin of the low and high water shores."

It will be seen from the above that General Warren
169 would *not* have chosen such a location for the Hannibal bridge as it now has, as it conforms in no respect to what he considers a proper location. Nor does the rise at Hannibal much exceed 20 feet (22.5 being extreme high water), and General Warren explicitly states that he had in mind the Ohio, the Missouri and the lower Mississippi, where the range is from 30 to 55 feet. In fact, no difficulty occurred in placing the draw near the shore at St. Paul, Dubuque, Sabula, Burlington, Fort Madison, Keokuk, Quincy, Louisiana and Alton, where the range is about the same as at Hannibal; nor would any difficulty be experienced if the draw of the Hannibal bridge were moved to the west, as a sheer boom could then be advantageously placed, and then the bridge location would conform to the views of General Warren.

Page 67, par. 3: this refers to a map sworn to by T. M. Strain, a Wabash engineer, and filed by the bridge company. Measurements from this map have already been given, which indicate that the bridge is not a legal structure today, whatever it may have been supposed to be heretofore. Page 68, par. 1: Mr. Meigs' measurements do actually show that the clear widths of waterway given were correct at the time he made them, and, like the measurements of the Wabash engineer, show conclusively that the widths of the draw-spans are not such as are required by law.

Page 68, par. 2 is hardly a fair interpretation of the act, but one not worth while to dispute. It was evidently meant that the raft spans should have a clear width of 250 feet, which neither of

them have, in fact the western one has a clearance of only about 220 feet at low water.

170 Page 68.—Par. 5: If a bridge is dangerous at high water, it is a bad obstruction. Boats cannot tie up at high water and wait for a fall. The records of this office show that from 1879 to 1904, inclusive, the river at Hannibal was at a stage of 10 feet or over (which may be considered high water), 1627 days, or an average of 62 days per year. It would not be fair to compel steamboats to tie up 62 days every year on account of the Hannibal bridge. While the current may be direct for a short distance above and below, it has been clearly shown that it is very swift and that there are cross currents in the draw.

Page 85, par. 1: Statement in error, as there have been a great number of accidents in the past twenty years.

Page 92, par. 4: It may be said, and it cannot be contradicted, that the worst accidents have happened in the day time and to boats going up stream. Such were the accidents to the Dictator and the Flying Eagle. Page 93.—Par. 3 is in error. No bridge on the upper Mississippi River has so bad a record as the Hannibal bridge, nor is any other bridge considered dangerous to such a degree as to justify complaint. Par. 6: The attorney for the bridge company unwittingly calls attention in this paragraph to affidavits that prove the bridge an illegal structure, as showing the existence of obstructions in the draw 2.5 feet above low water, which diminish the clear width.

Page 94, par. 3: There appears to be little warrant for any of the statements made in this paragraph, but none of the affidavits and statements mentioned are considered material. It is worthy of remark, however, that all of the witnesses for the bridge company (except one) are in this very class, which the bridge
171 company's attorney ridicules. Page 95.—Par. 1: As the bridge company claims that the bridge and the channel are just as they were and have been for 35 years, it would appear that the testimony of all of these old men is just as good as ever. High water is not infrequent,—it occurs on an average 62 days each year. Page 95 (par. 3) and pages 96-97.—It would have been well for the bridge company not to call especial attention to the names and character of these witnesses. Not one of them (with the possible exception of Curtis) has any claim to be considered an expert witness in this matter, and nearly all of them are either in the pay of the bridge and railway companies, or more or less interested in keeping the bridge as it is. It seems singular at least that the bridge company is unable to present the testimony of a single pilot of known capacity in its behalf. Of the 200 or so pilots of the upper Mississippi River the Diamond Jo Line employs perhaps a dozen, and the bias of the pilots as a body against the Hannibal bridge can only come from their knowledge of its evil character, and not from their affiliation with the packet company.

9.—In the brief of Hughes & Sawyer (Doc. 1) for the Diamond Jo Line of Steamers, *et al.*, the statement of the case is correct (pp. 1-4). The testimony at the public hearing is given correctly and

the affidavits and statements on the side of the steamboatmen in full (pp. 5-29). The evidence and protest on the part of the bridge company (Doc. 6) is faithfully given, but only one pilot testifies for the bridge company. The evidence of A. O. Cunningham, Edward Shelah and Geo. E. Francisco for the bridge company is not shown, it having been given subsequently to the filing of the brief (pp. 30-37).

The evidence of river interests in rebuttal is given in full (Doc. 10), but is considered of little value, as the parties are not practical steamboatmen, though they are fully as good witnesses as most of those brought in by the bridge company. It is noted, that Wm. G. Lundbeck, U. S. Boiler Inspector, states that two of the so-called pilots furnished by the bridge company (Wm. L. Pound and Jas. C. Shaw) are railroad engineers, licensed, as the record shows, as pilots of vessels of 10 tons and under. Their license covers the river from Louisiana to Quincy, about 50 miles (pp. 38-40).

On page 41, the statement of the Department of Commerce and Labor (Doc. 14) is given in full, and shows that of the three accidents investigated (Dictator, Clinton and Rob Roy), all were due to cross currents in the draw. Pages 42-43 give the record of Mr. Meigs' measurements of the raft and draw spans and a description of the methods employed, which are practically a copy of his letter dated July 14, 1905 (Doc. 11). These measurements at a stage of 12.2 feet above low water show that at that stage the openings were narrower than the law designates. The accompanying sketch (blue print) explains the statements in the letter and gives other interesting information. Two other letters from Mr. Meigs are also included in Doc. 11.

The statement of facts and argument beginning on page 45, states correctly the various acts or sections of acts of Congress applicable to the case. On page 46, *et seq.*, the argument is in my opinion entirely correct as shown by the evidence and statements of experienced navigators.

Summary.

(a) It is thought to be proved by the overwhelming *testimony* of pilots, masters and owners of steamboats,—the men most qualified to give opinion and decide on the merits of the case,—and also by the numerous *statements* of the same classes of people, that the Hannibal bridge is a very dangerous obstruction to navigation at high stages of the river and has caused much destruction of property, loss of life and delay, four large steamers having been destroyed, and many other steamers as well as rafts having been seriously injured.

(b) The reasons given, and demonstrated, for the dangerous character of the obstruction are: that at high stages (above 10 feet) the current through the draw is very swift,—much swifter than at any bridge on the river,—in fact, swifter than at any other part of the upper Mississippi River between the mouth of the Missouri River and St. Paul, except at the Rock Island and Des Moines rapids;

while this velocity would not under ordinary circumstances be objectionable to boats going *down* stream, provided the approach was suitable and the current direct through the spans and at right angles to the axis of the bridge (which is not the case at this bridge), yet to boats going *up* stream, and especially those with tows, the passage is extremely dangerous, onerous, and often impossible, and some of the worst accidents have happened to boats endeavoring to pass up through the draw; that there are cross currents and boils in the

draw and at the head of the long pier, which cause boats to
 174 lose their steerage way and drift against the piers, said cross currents and boils being in part due to the permeable nature of the floating draw crib and also to the immense quantities of rip-rap thrown around the piers to protect them from being undermined; that the floating crib itself is a bad obstruction, being so low that the wheels, fantails and guards of boats are liable to catch on it, and have in several cases caught on it, with great detriment and loss; that the rip-rap itself is an obstruction at low stages, as it can be struck by steamboats and rafts, the latter requiring all the available space in the draw, which space is seriously diminished in width by such rip-rap at low stages; and further, that the draw spans located out in the river away from the shore, are in this case, and in that of every bridge, extremely objectionable unless proper sheer booms or guide fences are provided, as has been done at other bridges of this class on this river. It is thought that to maintain such a boom or guide fence at the Hannibal bridge would be impracticable, on account of deep water, swift current, and the immense quantities of drift at high stages. Such a boom would, moreover practically close the shore *span* and thus be a detriment to the lumber companies making use of that span to pass their lumber through.

(c) Whatever may have heretofore been said or thought to the contrary, it is manifest from the recent measurements of Messrs. Meigs and Strain (Documents 11 and 7) that the draw spans do not now have the clear width of 160 feet prescribed by the law of any state, and the map of Mr. Strain, the Wabash engineer in charge of

Hannibal bridge, sworn to by him as correct, shows much less
 175 clearance than the 160 feet the law prescribes, and especially at low stages where rip-rap is met with. It appears that in this respect the bridge is an illegal structure.

(d) Assuming the entire removal of the bridge to a more favorable locality to be out of the question, and that an enlargement in width of the waterway or great increase in length of draw spans is inadmissible, the remedy proposed,—which meets the views and has the approval of all the navigators whose opinions in affidavits and statements have been received at this time, as well as of about 70 other pilots and masters received in 1892 (there being but very few dissenting views in 1892 and none in 1905).—is to move the draw-span about 160 feet to the west, so as to bring one opening near the Missouri shore, with booms or fences along the shore above and below, along which boats and rafts could drop through safely at all times. Such a change would bring the Hannibal bridge

in accord with the principles now and of late years enforced in the cases of all bridges built across the upper Mississippi River. The practicability of such a change has been demonstrated by frequent surveys and can be readily understood on referring to the profiles (Doc. 13). The current in the shore span, which span will be almost exclusively used at high stages, will be (as it is now) moderate, and the sheer booms will afford ample protection and guidance to all classes of navigation; nor will the lumber traffic of the city of Hannibal be seriously interfered with, although the width of the shore span will be somewhat diminished. The profiles also indicate the entire clearance of

160 feet at low water, and it is known that a small amount of dredging at the shore and pier ends would materially and sufficiently deepen the proposed draw opening. Owing, however, to great depth of water and the desirability of extending piers down to the rock, the estimated cost of the change is large, being approximately \$150,000.

(e) I am personally familiar with the conditions at the Hannibal bridge, and I consider the complaints of navigators just, and I believe that the bridge in its present state is a very dangerous obstruction at high stages of water. I do not believe that with the draw in its present location, any system of booms, piers or fences can be devised and successfully maintained to make the bridge safe and convenient for all classes of navigation; and I am therefore confident that the indicated change in the location of the draw, as proposed by navigators of this river, and by this office, is the most practical plan for facilitating navigation through this bridge.

(f) Following the lead of Majors Mackenzie and Lusk, and having presented in this letter and the accompanying documents all the facts in my possession regarding the relation of the Hannibal bridge to the interests of navigation, I have the honor to recommend the carrying out of the work desired by the navigators, viz:

"The west draw pier (first pier from Missouri shore), to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted in to an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-
177 work to be built above and below the new pivot-pier; and proper guard fences to be built along the Missouri shore above and below the new shore-pier.

"Each of the draw-openings on the new location of draw span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

"The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers."

It is thought that a year from the time of notification should be granted the companies interested, to make the required changes in the bridge.

(g) It is thought that the advertising of the public hearing and

the personal service of notices of the prescribed form, as shown in paragraph 4 of this letter, is in full compliance with the law and the orders of the department.

(h) The bridge company claims that the act of March 3, 1899, conferring power on the Secretary of War to give notice to alter and change bridges is unconstitutional and void, and further, that the Secretary of War has no right to delegate to another the authority to hold a public hearing. These are matters of law that I am incompetent to decide, but they are dwelt upon at length in both of the accompanying briefs. It is believed, however, that these matters have already been decided in favor of the law and the authority of the Secretary of War.

Very Respectfully,

Your obedient servant,

C. W. DURHAM,

Principal Assistant Engineer.

DISTRICT ATTORNEY: I now offer, as a part of this same document, the report and recommendation of Major C. S. Riche to Major Mackenzie in regard to this same bridge, it being the next document in order to this recommendation of Major Riche, dated Rock Island, January 13, 1906.

The paper referred to is in the words and figures following, to-wit:

United States Engineer Office, Upper Mississippi River Improvement.

ROCK ISLAND, ILL., *January 13, 1906.*

Brig. Gen. A. Mackenzie, Chief of Engineers, U. S. Army, Washington, D. C.

GENERAL: In response to your 6th indorsement, dated February 13, 1905 (47489-11), I have the honor to submit the following report regarding the Hannibal Bridge:

A. The law and the orders of the Department have been fully complied with.

B. Every opportunity has been given the representatives of this bridge to present their full views.

C. The bridge today is an illegal structure.

D. It is an unreasonable obstruction to the present navigation of the Mississippi River.

E. There is great difficulty in passing its draw openings at high stages.

F. The continuance of existing conditions is liable at any moment to lead to an appalling disaster and great loss of life.

G. Previous recommendations as to alterations necessary in this bridge to render navigation through it reasonably free, easy and unobstructed, are concurred in.

2. A review of the various measures taken in this matter is given in the inclosed report of Asst. Engr. C. W. Durham, which, with its accompanying documents, shows that the law and the orders of the Department have been fully complied with.

3. The papers in the case were sent to the attorneys for
181 the complainants, Messrs. Hughes & Sawyer, on June 20,
1905 and were returned by them with their brief on September 11, 1905.

4. Their brief and the papers were sent to Mr. Geo. A. Mahan, the authorized representative of the bridge interests on September 15, 1905, and returned by him with his brief on December 11, 1905. Mr. Mahan was given all the time he desired to prepare his brief, and was also given full information regarding all matters of record that he asked for.

5. Considerable stress seems to be put by the attorney for the bridge interests upon his argument that Congress alone has the power to require alterations, etc., at this bridge I presume similar cases have arisen before, and that precedents can be found that bear upon this feature of the case.

6. Primarily, however, this argument of Mr. Mahan's is based upon the assumption that the bridge was built in compliance with the requirements of the Act of Congress of July 25, 1866.

7. As a matter of fact, the bridge does not comply with the express requirements of said act, and hence Mr. Mahan's argument falls.

8. Said act requires that the draw spans shall be "*not less than one hundred and sixty feet in length in the clear, on each side of the central or pivot pier of the draw.*"

9. As taken from the drawings submitted by Mr. T. M. Strain on behalf of the bridge company, and sworn to by him as correct and true, and as substantially verified by this office, the following are the *clear* openings on either side of the pivot pier:

At top of piers.....	east,	157.5 ft.,	west,	157.5 f.
At high water.....	"	156.5 "	"	156.5
At 11.5-ft. stage.....	"	155.5 "	"	155.5
At low water.....	"	151.5 "	"	146.5
182 At 3 ft. below low water.....	"	140.0 "	"	134.0
At 4-1/2 ft. below low water...	"	135.0 "	"	132.0

10. The natural clear width of draw span opening at this bridge has been materially diminished by the deposit of masses of rip-rap about the piers. At low water the narrowing is 8½ feet in one channel and 13½ feet in the other; and at 4½ feet below low water (the specified depth of channel which Congress has already appropriated some \$11,000,000 to secure), one channel is narrowed 15 feet and the other 18 feet?

11. This is no mere technicality. This narrowing alone forms a serious obstruction to navigation, and when the damming effect on the river of this rip-rap is considered, it is clear that a great part of the present trouble at this bridge is directly caused by its failure to comply with the clearly expressed provisions of the Act of Congress under which it is claimed to have been constructed.

12. That the bridge is an unreasonable obstruction, and that there is difficulty in passing its draw, seems overwhelmingly shown by the statements and affidavits of those competent to give opinions on such a subject.. The river pilots are almost unanimous in their views

regarding this bridge. This matter is discussed in the inclosed report of Asst. Engr. Durham and its accompanying documents, to which attention is invited.

13. My predecessor, Major Lusk, in his report to you of February 1, 1905 (47489/19), states that from personal observation and experience, especially during the great flood of June 1903, he is satisfied that this bridge is an unreasonable obstruction to navigation. I personally inspected conditions at this bridge on June 15, 1905, when the river was at a high stage (15.7 ft.), and concur in Major Lusk's view.

183 14. That this impression is general, and is the view of the great majority of the people interested directly and indirectly in the navigation of the river, is shown by the following resolutions which was passed at the annual convention of "The Upper Mississippi River Improvement Association," held at La Crosse, Wis., October 10-11, 1905—

"Resolved, that we also heartily endorse the efforts being made to secure the draws of the various bridges along the river and especially the one at Hannibal, Mo., that has caused in the last twenty years more loss of life and property than all the steamboat losses by fire and explosions on the upper Mississippi river; and that there be more rapid service in the operation of draws on railroad bridges on the Mississippi."

15. The wrecks that have already occurred at this bridge would seem sufficient warning as to what may be expected in the future if existing conditions are permitted to continue. Some of these wrecks may have been due to careless handling of boats; I have no evidence that some were not, but I do not believe that any of the reputable pilots on the river would attempt to pass this bridge in a careless manner,—their statements and affidavits certainly do not indicate it; and in three cases where investigation of such accidents was made, side-currents and cross-currents in the draw of the bridge were found responsible (see Doc. 14 accompanying inclosed report of Asst. Engr. Durham).

16. In this connection, attention is especially invited to the photographs of boats now navigating the upper Mississippi River (forming Doc. 12, accompanying Mr. Durham's report), and particularly to the photograph of the excursion steamer "J. S."

17. The excursion business on the river is increasing. It is by no means an impossibility that the "J. S.," or a similar boat, with 2000 or more people on board, may attempt to pass this bridge, and, if present conditions are not remedied, that it may be wrecked.

18. In such a case there would be a demand by the public to fix responsibility for such disaster on those to blame for the continuance of the dangerous conditions that had caused it. I cannot too strongly recommend, therefore, that the alterations necessary to make this bridge reasonably safe be required to be made.

Recommendations.

19. In view of the depth of water, strong currents, prevalence of drifts, etc., I am of opinion that the maintenance of suitable guide-fences and sheer-booms is impracticable with the present location of the draw, and, as such guide-fences, etc., are essential, that this draw should be moved next to the Missouri shore, as previously recommended. It is admitted that this would be somewhat expensive, but there seems to be no other feasible and practicable way of rendering navigation through this bridge reasonably free, easy and unobstructed.

20. I therefore have the honor to recommend that the following alterations in this bridge be ordered:—

The west draw-rest pier (first pier from Missouri shore,) to be converted into a pivot-pier; a new draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work, to be built above and below the new pivot-pier, the existing cribs and crib-piers to be removed, and proper guard-fences to be built along the Missouri shore above and below the new shore-pier.

Each of the draw-openings on the new location of draw-span to give at all stages of the river a clear width of waterway of not less than 160 feet, available for boats drawing 6 feet of water.

The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers.

The work to be done without interruption to navigation, and under the supervision of the Engineer Officer in charge of the locality.

185 One year from date of giving such order should be allowed as a reasonable time in which to make the required alterations.

Very respectfully, your obedient servant,

C. S. RICHE,

Major, Corps of Engineers.

At this point recess was taken until 2 o'clock.

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HANNIBAL, Mo., May 28, 1908.

After recess on Thursday, May 28, 1908, the following proceedings were had:

DISTRICT ATTORNEY: I now offer and read in evidence what is designated as endorsement No. 5 of Government Exhibit No. 3.

The paper referred to is in the words and figures following, to-wit:

"5th Indorsement.

WAR DEPARTMENT, February 9, 1905.

Approved as recommended by the Chief of Engineers.

ROBERT SHAW OLIVER,

Assistant Secretary of War."

DISTRICT ATTORNEY: I now offer and read in evidence what is designated as endorsement No. 6 of Government Exhibit No. 3.

The paper referred to is in words and figures following, to-wit:

"6th Indorsement.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *February 13, 1905.*

187 1. Respectfully returned to Major Lusk inviting attention to 4th and 5th indorsements hereon by which he will be guided.

2. It is desired that Major Lusk's further report shall show that the law and the orders of the Department have been fully complied with.

3. The sum of \$300 is hereby allotted from the appropriation for examinations, surveys, and contingencies of rivers and harbors, as requested in Major Lusk's letter of February 1, 1905, for payment of the necessary expenses of this investigation and hearing.

To be returned.

By command of Brig. Gen. Mackenzie:

H. F. HODGES,
Major, Corps of Engineers."

DISTRICT ATTORNEY: I now offer and read in evidence what is designated as endorsement No. 7 of Government Exhibit No. 3.

The paper referred to is in the words and figures following, to-wit:

"7th Indorsement.

U. S. ENGINEER OFFICE,
ROCK ISLAND, ILL., *Jan. 13, 1906.*

188 Respectfully returned to the Chief of Engineers, U. S. Army, inviting attention to my report of this date, accompanying.

C. S. RICHE,
Major, Corps of Engineers."

DISTRICT ATTORNEY: I now offer and read in evidence what is designated as endorsement No. 8 of Government Exhibit No. 3.

The paper referred to is in the words and figures following, to-wit:

"8th Indorsement.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *March 12, 1906.*

1. Respectfully returned to the Secretary of War.

2. These papers have reference to the bridge over the Mississippi River at Hannibal, Mo., complained of as an obstruction to navigation.

189 3. This bridge was built in 1871 under authority of sec-

tion 5 of an act of Congress approved July 25, 1866 (U. S. Statutes at Large, Vol. 14, p. 244). The law did not require that the plans for the bridge be submitted to the Secretary of War for approval, and this was not done, but it reserved the right to alter or amend the said act so as to prevent or remove all material obstruction to the navigation of said river by the construction of bridges.

4. Action against the bridge as an obstruction to navigation was begun under the provisions of sections 9 and 10 of the river and harbor act of August 11, 1888, and notice was issued requiring its alteration. The terms of the notice not having been complied with, the Department of Justice was requested to institute legal proceedings to compel the alteration of the bridge, but these proceedings were abandoned in pursuance of the wishes of the Secretary of War as expressed in letters of February 24, 1891, to the Chief of Engineers, and June 6, 1891, to the Attorney General.

5. Complaint having been made against the bridge, proceedings were begun anew in November 1891, under the provisions of sections 4 and 5 of the river and harbor act of September 19, 1890, and in accordance with instructions of the War Department of September 16, 1891, without reference to any previous action. The hearings

required at that time were held by me, as district officer in charge of improvement of the section of the river crossed by the bridge, and, after full consideration of the facts, arguments and statements, the bridge was reported to be an unreasonable obstruction to the navigation of the river on account of the swiftness of the current at certain stages of the river, unfavorable approaches of the draw openings from above and lack of facilities for guiding vessels and rafts through the draw openings. The alterations considered necessary at that time were the same as stated below and which it is now proposed to require to be made. The papers were submitted to the Secretary of War by the Chief of Engineers by indorsements dated July 22, 1892, and January 11, 1893, concurring in my views and recommending service of notice requiring alteration of the bridge as specified. The decision of the Secretary of War in the matter is shown by his endorsement dated January 17, 1893, in which it was stated that "no order will be made requiring the reconstruction or improvement of such bridge, the same not being an 'unreasonable obstruction to the free navigation' of the river." (See 2553 W. D. 1892.)

6. No change in the status of the case occurred until the filing of this paper and accompanying petitions and reference is made to 4th and 5th indorsements hereon for previous action in this matter.

7. Pursuant to the instructions of the War Department the papers have been returned to the local officer who has held a public hearing as required by the law and the orders of the Department after due notice to interested parties who have been afforded an opportunity to express their views, and attention is invited to the report of Maj. C. S. Riché, Corps of Engineers, dated January 13, 1906, and to its accompanying papers.

8. Major Riché reaches the conclusion that the bridge is an unreasonable obstruction to navigation by reason of the difficulty and

danger of passing through the draw openings, and that to render navigation through the bridge reasonably free, easy and unobstructed alterations should be required as follows:

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot pier to be cut down and converted into an east draw-rest pier; the present draw span to be moved west; new and solid long or protection piers, of crib work, to be built above and below the new pivot pier; the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw openings on the new location of draw span to give at all stages of the river a clear width of waterway of not less than 160 feet, available for boats drawing 6 feet of water.

192 (c) The new and remodeled piers to be so constructed as not to necessitate the use of riprap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers.

9. One year from the date of such order is considered a reasonable time in which to make the required alterations.

10. I recommend that notices be issued to the proper officials of the companies owning or operating the bridge, understood to be the Hannibal Bridge Co., the Wabash Railroad Co., and the Missouri Pacific Railway Company.

A. MACKENZIE,

Brig. Gen., Chief of Engineers, U. S. Army.

(On back of this document is following endorsement:) Office of the Secretary. Apr. 19, 1907. 8247/42. War Department.

193 DISTRICT ATTORNEY: I now offer and read in evidence, being a part of "Government Exhibit No. 4", the letters or orders preceding the issuance of the notices which were served upon the defendant companies to alter the bridge in question in accordance with the report.

Mr. MOFFAT: We object to the materiality of that, as being subsequent in point of date to the issuance of the order. The indictment charges the defendants with a violation of a notice bearing date March 10, 1906. And how are any records or orders subsequent to that date material?

DISTRICT ATTORNEY: After the contents become apparent to the gentlemen it will appear that these are letters showing that the notices were served.

Mr. MOFFAT: Even so, they are incompetent.

The COURT: Have you the notice and service of notice?

DISTRICT ATTORNEY: Yes, your Honor.

The COURT: Introduce them now.

Colonel BLODGETT: We object to the introduction of that paper in evidence, and we want to spread upon the record our objections to the paper.

The COURT: You are objecting to the paper signed by the Assistant Secretary of War that is included in the information?

Colonel BLODGETT: The defendants object to the introduction in evidence of the paper writing signed "Robert Shaw Oliver, Assistant Secretary of War," purporting to be a notice requiring the defendants to make certain alterations in the bridge described in the information, for the following reasons:

1. Because the paper writing offered in evidence does not prove or tend to prove any material allegation or charge contained in the information; and also because it is not a notice given or signed by the Secretary of War.

2. Because there is a variance between the allegations contained in the information and the paper writing offered in evidence in this, to-wit: The information charges that the Secretary of War gave notice to the defendant corporations, as parties owning and operating said bridge, to alter the same so as to render navigation through and under it reasonably free, easy and unobstructed; whereas the paper writing offered in evidence and purporting to be a notice, requiring the defendants to alter the bridge in the manner aforesaid, is not a notice signed, given or promulgated by the Secretary of War.

3. Because said paper writing to which the name of the Assistant Secretary of War purports to have been signed, is immaterial, for the reason that said Assistant Secretary of War was authorized by law to perform only such duties as were prescribed by the Secretary of War or required by law; and there is not now any law, nor has there ever been any law, authorizing any Assistant Secretary of War to give notice to any person or persons or corporation owning or operating any bridge over any of the navigable waters of the United States to alter the same in any respect; nor has the Secretary of War at or before the date of said paper writing, or at or before the alleged delivery of a copy thereof to the defendants, or any of them, ever directed or prescribed it as the duty of any Assistant Secretary of War to give notice to any person, persons or corporation, owning or operating any bridge over any of the navigable waters of the United States, to alter the same, or directing them or requiring them to alter the same, in any manner whatsoever.

4. The paper offered in evidence alleged to be signed by the Assistant Secretary of War, requiring the defendants to make alterations in said bridge, does not specify or describe the alterations required to be made in said bridge with such certainty as would enable the defendants to comply therewith, in this: that said paper writing, among other things, states that new solid long or protection piers of crib-work shall be built above and below the new piers, whereas the length of the protection piers required to be built by the defendants is nowhere stated in said paper writing.

5. The paper writing offered in evidence and alleged in the information to be the notice given by the Secretary of War to the defendants, requiring them to make alterations in said bridge, does not state the alterations required to be made in said bridge so as to enable them to comply with the same, in this: That

said paper writing, among other things, states that proper guard fences shall be built along the Missouri shore, above and below the new shore pier, whereas the paper writing does not anywhere state the length, height or width of said guard fences, or state what would constituted or be regarded by the Secretary of War as proper guard fences, either above or below the proposed new shore pier when made.

In addition to these there were objections made here, in the discussion of the demurrer that was filed by the defendants, and in passing upon that demurrer the Court, as I understand the ruling, held, as a legal presumption, that a notice signed by the Assistant Secretary of War was the same as a notice signed by the Secretary of War himself; and that it was good for that reason; and on account of that presumption in which the Court would indulge itself, or the Government—

The COURT: I don't know that that states fully my position: The opinion of the Court is, that the official action of the War Department by the Assistant Secretary of War signing this paper, is in point of fact the action of the Secretary of War.

Colonel BLODGETT: That would be conclusive if there were a statute that authorized the Assistant Secretary of War to represent the Secretary, and act for him. But there is no such statute.

197 What I desire now, if the Court please, and will permit it at this stage, is to rebut that presumption by a reference to the statute and the rules of the War Department, made in pursuance of the federal statute which prohibits the Assistant Secretary of War from acting upon a matter of this sort.

Now it is immaterial, if the Court would say, certainly this Assistant Secretary of War had no such power. That would end the case. I would like to make the objection now.

The COURT: I will be glad to have you make it now. It is the proper time to make it now, upon the offer of this paper.

Colonel BLODGETT: If the Court please, the Act of March 5, 1890, creating the office of Assistant Secretary of War provides as follows:

"Be it enacted, that there shall be in the Department of War an Assistant Secretary of War who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of \$4500 a year, payable monthly, and who shall perform such duties in the department as shall be prescribed by the Secretary or which may be required by law."

Now, if your Honor please, inasmuch as there is no law authorizing him to act in cases of this kind, and inasmuch as the law imposes this duty imperatively upon the Secretary himself,

198 the only further inquiry would be as to the rules of the Department made in pursuance of another Act of Congress, which says:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business and the custody and protection of the records, papers and property pertaining to it."

That is the whole of the Act, and I have read the whole of the Act creating the position of Assistant Secretary of War.

I am trying now, and the sole purpose of this testimony is, to rebut the presumption that the Court indulged in with respect to the powers of the Assistant Secretary of War.

We have a certified copy of the rules of the Department——

DISTRICT ATTORNEY: Do I take it that counsel is now offering testimony?

The COURT: He is not offering testimony; he is offering rules.

Colonel BLODGETT (resuming): This order is dated "Washington, December 30, 1903" and signed by Elihu Root, Secretary of War, and reads:

"The Secretary of War reserves for his final action all cases involving questions of policy, the establishment or reversal of precedents, or matters of special or extraordinary importance, arising under the division or jurisdiction hereinafter set forth, and the following classes of business"—and then he goes on to state what those are.

Now, I want the Court to get exactly our view of it.

"Subject to the foregoing condition and reservation, the jurisdiction of the Assistant Secretary will extend to the following military and civil matters:

"Business arising from the laws pertaining to the navigable waters of the United States."

Now that would seem to show that this power was delegated to the Assistant Secretary of War, but for this reservation in the preamble, which precedes that, wherein the Secretary of War reserves for his own official action "all cases involving questions of policy, the establishment or reversal of precedents, or matters of special or extraordinary importance."

Now if in taking this action the Assistant Secretary of War reversed a precedent, then he had no power, under these rules, to reverse it. That is reserved, absolutely, under these rules, to the Secretary of War himself. Nobody will dispute that.

What has the Government put in evidence here? It has put in evidence the finding of Secretary of War, S. B. Elkins, in 1903, wherein this very evidence about the Hannibal Bridge was in review and was examined and set aside, because the Secretary of War found then that this bridge was in all respects a lawful structure and not an unreasonable obstruction to navigation.

Now is it for another Secretary of War or Assistant Secretary of War to reverse that finding of Secretary Elkins? That is to reverse a precedent and destroy that precedent.

It is the same as in the courts: If this case had come before this Court in 1893, and this Court had found it was written in the book, and there was a law saying that this Court should not reverse a precedent, and it should come before it and say it was confronted with the opinion of its own finding and its own declaration and judgment, no one would contend that this Court should, in violation of that rule which had reserved to the Court of Appeals all matters involving the reversal of a precedent.

Here is a solemn finding and the Government has produced it here and read it in evidence, that this bridge was constructed in accordance with the Act of Congress, and it was a lawful structure and not an unreasonable obstruction to navigation.

Here is the finding (indicating book). Perhaps the Court did not get the full impression of it when it was read.

The COURT: Secretary Elkins decided it was not an unlawful structure and dismissed the complaint.

Colonel BLODGETT (reading): It appearing from the within papers that the Hannibal Bridge was constructed according to the Act of Congress authorizing the same, that there have been no serious accidents to boats at this bridge during the past ten years; that there has been no general demand by river interests for a change in the bridge, and there is difference of opinion" etc., etc.—and the changes then proposed are precisely like those now before the Court—"that the complaints made against the bridge have been based on *ex parte* statements, and the proposed reconstruction of the bridge would involve a large expense to those owning or operating the same, without positive assurance of permanent advantage to river interests; no order will be made requiring the reconstruction or improvement of such bridge, the same not being an "unreasonable obstruction to the free navigation" of the river."

Now for Assistant Secretary of War, Robert Shaw Oliver to overrule that finding of the Secretary of War, and it does not make any difference whether it was Secretary Root or Secretary Taft, he is the official head and the Secretary of War under the Act of Congress and under the Constitution; and to order it set aside, disregard it and ignore it, is prohibited by these rules to which I have referred your Honor.

Secretary Taft, in this Union Bridge Company case—it is where he is reviewing the action of Secretary Root—(I will read that part of the opinion which quotes the finding of Secretary Taft, and I shall have to read a little in advance so your Honor will get the connection:

202 "Under date of twentieth of January, 1903, Mr. Root, then Secretary of War, issued a formal notice to the Bridge Company stating that he had good reason to believe that its bridge was an unreasonable obstruction to free navigation. The notice informed the company of the alterations of its bridge recommended by the Chief of Engineers as necessary, and concluded: "And whereas, eighteen months from the date of service of this notice is a reasonable time in which to alter the said bridge as described above; Now, therefore, in obedience to, and by virtue of, section eighteen of an act of the Congress of the United States entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, I, Elihu Root, Secretary of War, do hereby notify the said Union Bridge Company to alter the said bridge as described above, and prescribe that said alterations shall be made and completed on or before the expiration of eighteen months from the date of service hereof."

At the request of the Bridge Company, the time fixed by Secretary Root for altering, changing and elevating the bridge was extended by his successor, Secretary Taft, to December 1st, 1904. By order of the latter officer the time was extended to January 1st, 1905.

Subsequently, a rehearing was asked for by the Bridge Company but the rehearing was refused and Secretary Taft made the following order: "The Union Bridge is an unreasonable obstruction to
203 commerce of the Allegheny River. If the bridge were not there, the winter refuge which the stretch of the Allegheny River up to the next bridge would offer for the fleet of boats, which usually are moored in the Monongahela, would be a very great advantage for navigation and commerce on the Ohio River and its tributaries. The two rivers, the Allegheny and the Monongahela, because they rise in different sections of the country, have their ice breaks at different times in the early Spring. The mouth of the one offers very desirable refuge to the vessels that are exposed to danger from the breaking up of ice in the headwaters of the other. The Union bridge at the mouth of the Allegheny was erected at a time when the Secretary of War was not given specific control over navigable streams, and was not authorized to inhibit the construction of bridges which were likely to obstruct navigation, but it appears that an army engineer, Colonel Merrill, in charge of the District, publicly announced that this bridge was an obstruction to navigation when it was erected. It was erected, therefore, in the face of the information given by the best authority that could be consulted in that matter in the Government. These are the facts that I find independently of any previous adjudication; but added to this is the finding of my predecessor, Mr. Root, to exactly the same effect, upon which he based an order that the bridge as an obstruction to navigation be abated. This matter is now before
204 me on a petition for rehearing of Mr. Root's order. As an original question I should have ruled as Mr. Root ruled, and *a fortiori*, because the orders of this Department are not to be lightly set aside, and are to be treated as a decree in equity would be and be set aside only upon a showing of a palpable error or mistake. The petition for rehearing is denied, and the order suspending the operation of Mr. Root's order is now revoked. The order will be put in full force and executed by the proper officers and the Union Bridge will be notified accordingly."

The point in that paragraph of the opinion is that these rules and decisions of the Secretary of War are to be respected, and, as he says, they have the force of a decree in equity.

I understand we may consider these rules in evidence?

DISTRICT ATTORNEY: Yes.

DISTRICT ATTORNEY: We are again confronted with a paradoxical situation: These defendants are standing in court urging upon this Court the mighty and binding nature of an order of the Secretary of War and here is an order that has been in force in this court for a period of months, to which they have paid no heed, and on a technical objection to the introduction of evidence, they ground it upon

the mighty and unerring nature of an order issued by the Secretary of War.

I want to take the very same statement of facts which they have used, to illustrate their position, to show that the whole thing
205 is a fallacy and not grounded upon one rock of common sense.

They say that there was a hearing early in the nineties on the Hannibal Bridge, and that evidence was heard and a finding was made by the Honorable Stephen B. Elkins; and that because twenty years afterwards another hearing was had, the facts and findings of the first hearing, governed solely by the evidence introduced at that time, shall be binding for all time to come, irrespective of how the situation may change, and what evidence may be introduced in these later hearings.

Take it as a parallel case that an accident happens in the year 1890 at 6th and Broadway, between an Adams Express Company wagon driven by John Smith, and street car No. 1. Then assume that this same Adams Express Company wagon, driven by the same John Smith, comes down 6th street in the year 1908, and that this same street car No. 1 comes along Broadway and runs into that wagon and runs it down, under exactly the same circumstances as before, yet the parties have their hands tied for all time to come, because the former accident has for all time to come determined the rights of the parties.

The defendants call the attention of the Court to the order of the Secretary of War where he reserves unto himself final action in all cases involving questions of policy and the establishment or
206 reversal of precedents: Concede that: But there is no precedent in this case because in the year 1905 the notices were issued and served and another hearing—the second case—(the second accident at 6th & Broadway) took place in Rock Island, where the parties were re-heard. It was not the evidence of the former hearing; entirely new evidence was submitted, and there is not yet in this case, nor will there be from start to finish, any evidence to show or any conclusion to be drawn, that the situation was the same then as it was at the time of the former hearing.

I say that is entirely separate and apart from any issue in this case. The Secretary of War is not called upon to, nor is the Secretary of War setting aside any precedent. He acted in accordance with his powers, which are specifically given him in this document introduced here by these defendants. He acted in accordance with business arising under the laws pertaining to the navigable waters of the United States; and he acted solely upon a case made up a year ago at Rock Island, and submitted to the War Department.

Certainly the Secretary of War was right when he held in the Union Bridge case that he would not reverse the finding of Secretary of War, Elihu Root, because that was on a re-hearing. That was asking him to reverse the order of his predecessor in the same case. There cannot be any contention in this case that we are acting in the same case that the Honorable Stephen B. Elkins acted on twenty years ago.

Therefore, I submit to the Court, as a first proposition,
207 that there is no precedent in this case. This is a case of first impression in the War Department, and now in this court for review by virtue of this criminal information.

I respectfully submit that the action of the Assistant Secretary of War is in strict accordance with the document just introduced by defendant's counsel. That this is a new and original proceeding, had in strict accordance with the powers conferred upon the Assistant Secretary of War, to-wit, the navigable waters of the United States.

MR. MINNIS: I wish briefly to reply to the District Attorney. The District Attorney is assuming that a precedent is a decision in the same case. Of course we know that this is not true. A precedent is a decision, possibly in some other jurisdiction, if speaking of a case in court, in a similar case or one involving a similar matter. To be a precedent it does not have to be a decision, because ordinarily a decision is *res adjudicata* and not to be inquired into. A precedent is not a decision in the same court, but a precedent, whether of the same court or another is a decision involving the same questions and the same subject matter.

DISTRICT ATTORNEY: May I ask you a question?

MR. MINNIS: Yes.

DISTRICT ATTORNEY: You do not contend that the same question is in dispute and the same evidence, as was before Secretary of War Elkins?

THE COURT: Go on, Mr. Minnis, and I will hear you.

208 MR. MINNIS: A precedent within the meaning of Secretary Root's rules is a decision by that Department upon a question. It might be upon various subjects. One Secretary might decide it and another Secretary comes in and another party would agitate it and want to make a new case out of it. I take it these rules reserve to the Secretary of War the finding, whenever any previous ruling upon the same subject matter has been entered in the Department by the same or a different Secretary.

DISTRICT ATTORNEY: I want to make one further suggestion—

THE COURT: I don't think I care to take up further time in reference to it.

The action of any Secretary under the decision of the court in the Union Bridge case, must be taken as a decree of the court, and so considered.

The point that is raised here, and the main point to decide is, as to whether this certificate signed by the Assistant Secretary of War, reciting in the certificate that the Secretary of War has considered this matter, is a sufficient certificate of what the Secretary of War has done, and whether a notice signed by the Assistant Secretary of War to the effect that "The Secretary of War has decided" is sufficient. That is the question, and the main question.

The objections are overruled. To which ruling the defendants excepted.

MR. MOFFAT: I thought you were passing upon the materiality of this paper?

209 The COURT: The objections to the papers are overruled. To which ruling the defendants excepted.

Mr. MOFFAT: I want to add a further objection, before your Honor's ruling.

The COURT: You may do it now.

Mr. MOFFAT: I wish to make a further objection to the competency of the notice of March 10th, to alter the bridge, as follows: That the evidence introduced by the Government now shows affirmatively that the Secretary of War did not consider the matter, did not exercise the discretion reposed in him by the Act of 1899, did not make any notice to alter, did not approve any findings of any subordinates in the Department, did not pass upon any recommendations made by his subordinates, and did not give any notice to the defendants.

Now when your Honor had before you the paper introduced on demurrer, which recited as a fact that the Secretary of War had reasonable ground to believe that the bridge constituted an obstruction, and that the Secretary of War notified the defendants to make the changes, then I understood it was immaterial, under the rule laid down on demurrer, whether he signed it or whether he instructed his subordinate to sign it. But that was upon the face of the notice itself.

But now the Government has gone ahead and laid before you a series of endorsements, showing progress of this matter through the

210 War Department from the time the complaint was lodged up to the making of this order. The authority which has been conferred from time to time during the course of that procedure has been, and necessarily must be, under the rules of the Department, noted by means of endorsements upon the record.

It appears in the Government's case and is of course a fact, that this matter did not come near the Secretary of War. It came to and the approvals were made by the Assistant Secretary of War, and the Secretary of War himself did not touch a pen to it, and it appears from the evidence adduced, that he did not see or hear of or know anything at all about this proceeding.

Now your Honor, when we come to consider—this is not a mere technical or frivolous objection we are making about the notice not being signed by the Secretary of War—when you come to consider that primarily this power was vested in Congress, but as construed by the Supreme Court in the Union Bridge Company case, wherein it was said the power may be delegated by Congress to the Secretary of War to determine what may be considered an unreasonable obstruction, we have a delegation by Congress to an Executive Department of a statutory power. Now we are not criticizing that finding, or making any contention against that delegation. We accept it as the law of the land. But your Honor will bear in mind the effect of the ruling—not on demurrer—but on the evidence which the Government has introduced,—the effect of a ruling which would say

211 that a hearing had upon the initiative of the Assistant Secretary of War, upon approval by the Assistant Secretary of War upon notice given under the statute by the Assistant

Secretary of War; a compliance with the statute. To give to such a notice and to such a proceeding the same force and effect as if done by the Secretary of War himself is a delegation first by Congress to the Secretary of War and then a delegation by the Secretary of War to the Assistant Secretary of War, of a discretion which we all believed until the Union Bridge Company case was decided, was vested by the Constitution in Congress alone.

Delegatus delegare non potest is a familiar maxim; and I think it is a serious question as to just what the Supreme Court decided, when in construing the Act of 1899 it said "The Secretary of War may use his discretion," because he is the head of a Department and a man of great power and standing in the land, is the head of one of the great executive Departments," when it said he might exercise his discretion as to whether the bridge should or should not be moved. But to construe that still further and say a subordinate of his may exercise his discretion, it seems to me is an extension of the right of delegation we may pause at. Because if it goes to the Assistant Secretary, why should it not be permissible to say the Assistant may delegate it to the Chief of Engineers; indeed it would save trouble if the whole matter should go to Rock Island. We have a right to rely on the discretion of the man who is at the head of the Department; the man named in the statute; the man to whom under the

Union Bridge Company case Congress confided the discretion.
 212 The evidence shows that that man knows nothing about it; has done nothing about it, and we are called upon to act by an order of the Assistant Secretary of War upon proof that he alone was the man who initiated and ordered the changes to be made in the bridge.

The COURT: Same ruling as before.

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

The COURT: My idea about this case is that I intended you should have the benefit of every exception to the rulings of the Court, so when it is done the Court's ruling may be understood and you may have a complete record.

Mr. MOFFAT: We offer in evidence, as "Defendant's Exhibit 1" certain instructions relating to methods of business to be employed under the operation of the General Staff system, etc.

These orders are certified as correct copies by the certificate of Robert Shaw Oliver, Acting Secretary of War, under date of May 14, 1908.

The papers referred to are in the words and figures following, to-wit:

Theses papers will be found at page 468 of the record.

213 DISTRICT ATTORNEY: Now I will go back and call attention to the letters preceding the issuance of the notices to the defendant companies to which objection was made, and we did not get any further than that.

First comes the certificate of Brigadier General A. Mackenzie, Chief of Engineers, U. S. A. certifying as to the correctness of the

copies of papers contained in Exhibit No. 4, and as to the official positions of certain officers named in said certificate.

Also certificate of Robert Shaw Oliver, Acting Secretary of War, as to the official position of Brigadier General A. Mackenzie, Chief of Engineers.

Said certificates are in the words and figures following, to-wit:

214

“UNITED STATES OF AMERICA,
WAR DEPARTMENT,
WASHINGTON, *April 17, 1907.*

I hereby certify that the papers hereto attached are true copies of papers of record in the Office of the Chief of Engineers, United States Army. I further certify that H. F. Hodges and C. S. Riche were on the 10th day of March, 1906, Majors, Corps of Engineers; also that on the 20th day of March, 1906, W. L. Marshall was Lieutenant-Colonel, Corps of Engineers, and also that W. H. Bixby was, on the 10th day of March, 1906, Lieutenant-Colonel, as indicated by the copies of the reports hereto attached.

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

Be it known that A. Mackenzie, who signed the foregoing certificate, is the Chief of Engineers, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this 17th day of April one thousand nine hundred and seven.

[SEAL.]

ROBERT SHAW OLIVER,
Acting Secretary of War.”

215 The DISTRICT ATTORNEY: I next offer and read in evidence the letter addressed to Major C. S. Riche, signed by H. F. Hodges, Major, Corps of Engineers, dated March 13, 1906.

Said letter is in the words and figures following, to-wit:

216

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *March 13, 1906.*

Maj. C. S. Riche, Corps of Engineers, Rock Island, Ill.

MAJOR: 1. There is sent you herewith notice, in duplicate, dated March 10, 1906, addressed to the Hannibal Bridge Company, requiring alteration of its bridge over the Mississippi River at Hannibal, Mo. Please cause service of the same to be made by having one copy thereof delivered personally to the president of the company, and return the other copy, with affidavit duly executed, to this office, with letter reporting action taken under these instructions.

2. Similar notices addressed to the Wabash Railroad Company and the Missouri Pacific Railway Company have been sent, respectively, to Lieut. Col. W. H. Bixby, Corps of Engineers, at Chicago, Ill., and Lieut. Col. W. L. Marshall, Corps of Engineers, at New

York, N. Y., for service on the proper officers of these companies, and you will be advised of such service.

By command of Brig. Gen. Mackenzie:

Very respectfully,

IL. F. HODGES,
Major, Corps of Engineers.

217 DISTRICT ATTORNEY: I here offer in evidence the letter of Major Riche to Major Mackenzie, in which he acknowledges receipt of the notice which had been sent him and stating service had been made.

Mr. MOFFAT: To that we object for the reasons stated; that it was entirely subsequent to the making of this order, and is not proof of service of the order on any of the defendants; and, secondly, said letter is immaterial and irrelevant to the case.

The COURT: There could not be any service of the notice until after the notice was issued. You may show what the officials reported in reference to the matter, together with whatever service, if any, appears on the paper.

To which ruling of the court the defendant, by their counsel, then and there, at the time, duly excepted.

The paper referred to is letter of March 28, 1906, to Brigadier General A. Mackenzie, Washington, D. C., from Major C. S. Riche, acknowledging receipt of notice sent him, and is in the words and figures following, to-wit:

218 United States Engineer Office, Upper Mississippi River Improvement.

ROCK ISLAND, ILL., *March 28, 1906.*

Brig. Gen. A. Mackenzie, Chief of Engineers, U. S. Army,
Washington, D. C.

GENERAL: In compliance with your letter of the 13th inst. (47489 11), I have the honor to state that on the 17th inst. a duplicate of the within notice was served on the Secretary & Treasurer of the Hannibal Bridge Company.

It having been found impracticable to make the service on the President of the company in person, and the Secretary and Treasurer of the company having stated his willingness to accept service, I wired you as follows:

ROCK ISLAND, ILL., *Mch. 17, 1906.*

"Chief of Engineers, Washington, D. C.:

"President Hannibal Bridge Company reported seriously ill. Admittance positively denied. Secretary and Treasurer will accept service instead. Instructions requested.

"*RICHE, Engineers.*"

To the above I received the following reply:

"WASHINGTON, D. C., *Mch 17, 1906.*

"Major Riche, Rock Island, Ill.:

219 You are authorized to serve notice in matter Hannibal Bridge on Secretary and Treasurer of the company.

"*MACKENZIE, Chief of Engineers.*"

In accordance with the latter telegram, service was made as soon as practicable.

Mr. Dunn, who served the paper, has submitted an affidavit covering the facts in the case, which affidavit it has been thought advisable to attach to the retained notice, so that the situation may be fully understood in case any question should arise in the future.

Very respectfully,

Your obedient servant,

C. S. RICHE,

Major, Corps of Engineers.

220 DISTRICT ATTORNEY: I now call attention to the service of notice to alter the Hannibal Bridge, being the affidavit of James C. Dunn, and being part of "Government Exhibit 4," which is offered in evidence.

The paper referred to is in the words and figures following, to-wit:

221

J. A. G. O.

(19314)

WAR DEPARTMENT,

WASHINGTON CITY, *March 10, 1906.*

To the Hannibal Bridge Company.

Take Notice that:

Whereas, The Secretary of War has good reason to believe that the draw bridge, commonly known as the Wabash Railway Bridge, owned or operated by the Hannibal Bridge Company, *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable waterways of the United States) on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers; there being difficulty in passing the draw openings or draw spans of such bridge by rafts, steamboats, or other water craft;

And Whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy, and unobstructed, to-wit:

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot pier to be

222 cut down and converted into an east draw-rest pier; the present draw span to be moved west; new and solid long or protection piers, of crib work, to be built above and below the new pivot pier; the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw openings on the new location of draw span to give at all stages of the river a clear width of waterway of not less than one hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of riprap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers;

And whereas, To March 15, 1907, is a reasonable time in which to alter the said bridge as described above;

Now, therefore, In obedience to, and by virtue of, section eighteen of an Act of the Congress of the United States Entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899 (30 Stat. L., 1153), The Secretary of War hereby notifies the said Hannibal Bridge Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15, 1907.

ROBERT SHAW OLIVER,

Asst Secretary of War.

223

To retain.

Notice to Alter Bridge.

STATE OF ILLINOIS.

County of Rock Island, ss:

James C. Dunn being duly sworn, on his oath states that he made service of the within notice on the Hannibal Bridge Company—personally delivering a duplicate thereof to Alfred T. White, Secretary & Treasurer of said company at Brooklyn, N. Y., on the 17th day of March, 1906.

JAMES C. DUNN.

Subscribed and sworn to this 24th day of March, 1906, before me
K. T. ANDERSON,

[SEAL.]

Notary Public.

224 *Affidavit of James C. Dunn in Regard to Serving Notice on Hannibal Bridge Company.*

The affiant, James C. Dunn, being duly sworn, deposes and says that he is a clerk in the U. S. Engineer Office at Rock Island, Ill., and that, pursuant to instructions received from Major C. S. Riche, Corps of Engineers, U. S. Army, on March 15, 1906, in regard to personally serving "Notice to Alter Bridge," dated Washington City, March 10, 1906, on the President of the Hannibal Bridge Company, whose office was supposed to be in New York City, he at once proceeded to that city; that upon reaching New York City he was informed that Mr. Alex. M. White, President of the Hannibal Bridge Company, visited his office in New York City only at long intervals, on account of his advanced age; that affiant thereupon called at the residence of said Alex. M. White, at No. 2 Pierpont Pl., Brooklyn, N. Y., and was there informed that "said Alex. M. White was in his room, seriously ill, and that no one would be allowed to see him

under any circumstances; that said Alex. M. White was over 90 years of age and that all his business is now—and has been for about ten years past—transacted by his son, Alfred T. White, whose office is located at No. 130 Water Street, New York City;” that the affiant made every effort proper under the circumstances to gain admittance to the room of said Alex. M. White and serve said notice upon him,

but without success; that affiant then called at the office of 225 said Alfred T. White and there renewed his endeavor to arrange for a meeting with said Alex M. White; that the said Alfred T. White reiterated the statement made to the affiant at the residence of his father, bearing especially upon the fact that the latter is over 90 years of age, was then seriously ill, and had transacted no business of any kind for about ten years past,—that he, Alfred T. White, is Secretary & Treasurer of the Hannibal Bridge Company, and has Power of Attorney (which he exhibited to the affiant) to transact all of his father's business,—by “all” meaning, he said, “everything but make my father's will,” and then offered to accept said notice for and instead of his father. Affiant thereupon telegraphed to said Major C. S. Riche, briefly stating the circumstances and asking for further instructions; that in response thereto he received telegraphic instructions from said Major C. S. Riche to serve said notice on the Secretary & Treasurer of the Hannibal Bridge Company; and that in obedience thereto affiant did serve said notice on said Alfred T. White, Secretary & Treasurer of the Hannibal Bridge Company, at 9:40 P. M., March 17, 1906, at his residence at No. 40 Remsen Street, Brooklyn, N. Y.

JAMES C. DUNN.

Sworn to before me, and subscribed in my presence, at Rock Island, Ill., this 27th day of March, 1906.

[SEAL.]

K. T. ANDERSON,

Notary Public.

226 DISTRICT ATTORNEY: Here is another affidavit of James C. Dunn in regard to serving notice, which I offer in evidence, and which reads as follows:

“To Retain.

Notice to Alter Bridge.

STATE OF ILLINOIS,

County of Rock Island, ss:

James C. Dunn, being duly sworn, on his oath states that he made service of the within notice on the Hannibal Bridge Company, personally delivering a duplicate thereof to Alfred T. White, Secretary & Treasurer of said company at Brooklyn, N. Y. on the 17th day of March, 1906.

JAMES C. DUNN.

Subscribed and sworn to this 24th day of March, 1906. Before me.

[SEAL.]

K. T. ANDERSON,

Notary Public.

Mr. MOFFAT: I move to strike out the affidavits that the District Attorney has just read, because they are incompetent evidence in this case of service of papers upon the defendant.

Your Honor, we are not standing here upon technicalities without merit in them. If your Honor will think for a moment, we are brought into court charged with a crime, which involves a penalty of five thousand dollars a month—

227 The COURT: I don't care what the amount is, how much it is, whether it is five cents or a million dollars.

Mr. MOFFAT: Neither do I. We are charged with a crime which involves a penalty of five thousand dollars a month. We object to having any paper, and we object to having this paper offered, as not tending in any way to show the service of that order upon us. We object to it as immaterial and irrelevant in this proceeding.

The COURT: I don't know of any other way of serving the paper except by having the paper in his possession and making his affidavit of service upon the back.

Mr. MOFFAT: Except having the person here.

The COURT: The objection is overruled.

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

DISTRICT ATTORNEY: I now offer in evidence letter in the same form as the one read before, over the signature of H. F. Hodges, Major, Corps of Engineers, under date of March 13, 1906, addressed to Lieut. Col. W. L. Marshall, Corps of Engineers, New York, being part of Government Exhibit No. 4.

The paper referred to is in the words and figures following, to-wit:

228
WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *March 13, 1906.*

Lieut. Col. W. L. Marshall, Corps of Engineers, New York, N. Y.

COLONEL: 1. There is enclosed herewith a notice, in duplicate, dated March 10, 1906, addressed to the Missouri Pacific Railway Company, requiring alteration of the company's bridge over the Mississippi River at Hannibal, Mo.

2. It is requested that you make service of this notice by causing one copy to be delivered personally to the president of the company, who is understood to be Mr. George J. Gould, New York, N. Y., or other executive officer of the company. The other copy with affidavit properly executed, will be returned to this office, through Major C. S. Riche, Corps of Engineers, with letter reporting action taken under these instructions.

By command of Brig. Gen. Mackenzie:

Very respectfully,

H. F. HODGES,
Major, Corps of Engineers.

229 Mr. MOFFAT: Objected to on the same grounds as stated before, as being subsequent to the issuance of the order.

DISTRICT ATTORNEY: This is not subsequent.

Mr. MOFFAT: What is the date.

DISTRICT ATTORNEY: March 13, 1906.

Mr. MOFFAT: The order is dated March 10, 1906.

DISTRICT ATTORNEY: It is in the same form as the *the* one read before.

The COURT: Upon whom was that served?

DISTRICT ATTORNEY: This notice was in the same form and directed to the Missouri Pacific Railway Company.

Mr. MOFFAT: Have you ruled upon my objection, your Honor?

The COURT: The objection is overruled.

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

DISTRICT ATTORNEY: I now offer and read in evidence affidavit of service of notice to alter bridge served on Mr. Geo. J. Gould, March 20, 1906.

The paper referred to is in the words and figures following to-wit:

"To retain.

Notice to Alter Bridge.

STATE OF NEW YORK,

City of New York, ss:

230 William Daly, being duly sworn, on his oath, states that he made service of the within notice on the Missouri Pacific Railway Company by personally delivering a duplicate thereof to Mr. Geo. J. Gould, President of said company at No. 195 Broadway, New York City on the 20th day of March, 1906.

WILLIAM DALY.

Subscribed and sworn to this 21st day of March, 1906, before me.

[SEAL.]

WILLIAM J. TATE,

Notary Public, County of Kings, N. Y.

Certificate filed in New York County."

Mr. HERBEL: I make the same objection to this affidavit.

The COURT: On the ground that this man had no right to make this service?

Mr. HERBEL: On the ground that this is not proof of service. In other words, the affidavit is *ex parte* matter; we cannot ask the man about it; the service is not here. We are concluded by his statement that he served the notice upon a certain officer. We are precluded by his statement.

The COURT: You are not precluded. The objection is overruled.

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

The COURT: Congress has made a certified copy of the records in the War Department competent evidence in any civil or criminal cases, when properly certified here.

231 DISTRICT ATTORNEY: I offer and read in evidence letter in the same form and manner, in which is returned the notice to Brigadier General A. Mackenzie, to which we last referred. The notice itself is in exactly the same form as the one last read, directed to the Missouri Pacific Railway Company and signed by Robert Shaw Oliver, Acting Secretary of War.

The paper referred to is in the words and figures following, to-wit:

232 United States Engineer Office, Room H 7, Army Building,
39 Whitehall St.

NEW YORK CITY, *March 21, 1906.*

Brig. Gen. A. Mackenzie, Chief of Engineers, U. S. Army, Washington, D. C. (Through Major C. S. Riche).

GENERAL: In compliance with your letter of the 13th instant (E. D. 47489/11), I have the honor to report that the notice, addressed to the Missouri Pacific Railway Company, requiring alteration of the company's bridge over the Mississippi River at Hannibal, Mo., was personally delivered to Mr. George J. Gould, President of the Missouri Pacific Ry. Co., on the 20th instant.

The duplicate copy of the notice, with affidavit properly executed, is returned herewith.

Very respectfully, your obedient servant,

W. L. MARSHALL,

Lieut. Col. Corps of Engineers.

1st Indorsement.

U. S. ENGINEER OFFICE.

ROCK ISLAND, ILL., *March 28, 1906.*

Respectfully forwarded to the Chief of Engineers, U. S. A.

C. S. RICHE,

Major, Corps of Engineers.

233

WAR DEPARTMENT,

WASHINGTON CITY, *March 10, 1906.*

To The Missouri Pacific Railway Company.

Take Notice That:

Whereas, The Secretary of War has good reason to believe that the draw bridge, commonly known as the Wabash Railway Bridge, owned or operated by the Missouri Pacific Railway Company, *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable waterways of the United States) on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers; there being difficulty in passing the draw openings or draw spans of such bridge by rafts, steamboats, or other water craft;

And Whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonable free, easy and unobstructed, to-wit:

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot pier to be cut down and converted into an east draw-rest pier; the present draw span to be moved west; new and solid long or protection piers; of
 234 crib work, to be built above and below the new pivot pier;
 the existing cribs and crib piers to be removed, and proper
 guard fences to be built along the Missouri shore above and
 below the new shore pier.

(b) Each of the draw openings on the new location of draw span to give at all stages of the river a clear width of waterway of not less than one hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of riprap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers;

And Whereas, To March 15, 1907, is a reasonable time in which to alter the said bridge as described above;

Now, Therefore, In obedience to, and by virtue of, section eighteen of an Act of the Congress of the United States entitled "An Act making appropriations for the construction, repair, and preservation of certain works on rivers and harbors, and for other purposes," approved March 3, 1899 (30 Stat. L., 1153), The Secretary of War hereby notifies the said Missouri Pacific Railway Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15, 1907.

ROBERT SHAW OLIVER,

Asst. Secretary of War.

235 DISTRICT ATTORNEY: I offer and read in evidence letter dated March 13, 1906, from H. F. Hodges, Major, Corps of Engineers, addressed to Lieut. Col. W. H. Bixby, Corps of Engineers, Chicago, Ill., being part of Exhibit No. 4.

The letter referred to is in the words and figures following, to-wit:

236

WAR DEPARTMENT,
 OFFICE OF THE CHIEF OF ENGINEERS,
 WASHINGTON, *March 13, 1906.*

Lieut. Col. W. H. Bixby, Corps of Engineers, Chicago, Ill.

COLONEL: 1. There is inclosed herewith a notice, in duplicate, dated March 10, 1906, addressed to the Wabash Railroad Company, requiring alteration of the company's bridge over the Mississippi River at Hannibal, Mo.

2. It is requested that you make service of this notice by causing one copy to be delivered personally to the president of the company, who is understood to be Mr. F. A. Delano, Western Union Building, Chicago, Ill., or other executive officer of the company. The other

copy, with affidavit properly executed, will be returned to this office, through Maj. C. S. Riche, Corps of Engineers, with letter reporting action taken under these instructions.

By command of Brig. Gen. Mackenzie:

Very respectfully,

H. F. HODGES,
Major, Corps of Engineers.

237

UNITED STATES ENGINEER OFFICE,
508 FEDERAL BUILDING,
CHICAGO, ILL., *March 17, 1906.*

Brig. Gen. A. Mackenzie, Chief of Engineers, U. S. Army, Washington, D. C. (through Major C. S. Riche, Corps of Engineers, Rock Island, Ill.)

GENERAL: In compliance with instructions in letter from your office dated March 13, 1906 (E. D. 47489/11), I have herewith to report that I personally delivered a duplicate of the within notice, requiring the Wabash Railroad Company to alter their bridge over the Mississippi River at Hannibal, Mo., to the President of the said Railroad in this city on the 16th instant, and return herewith the other copy with affidavit properly executed.

Very respectfully,

W. H. BIXBY,
Lt. Col., Corps of Engineers.

1st Indorsement.

U. S. ENGINEER OFFICE,
ROCK ISLAND, ILL., *March 28, 1906.*

Respectfully forwarded to the Chief of Engineers, U. S. A.

C. S. RICHE,
Major, Corps of Engineers.

238 DISTRICT ATTORNEY: I offer in evidence the notice itself, which is the same form as the two preceding ones, with the exception that this one is addressed to the Wabash Railroad Company and is signed by Robert Shaw Oliver, Acting Secretary of War, being also a part of Government Exhibit 4.

The paper referred to is in the words and figures following, to-wit:

239

J. A. G. O.
(19314)

WAR DEPARTMENT,
WASHINGTON CITY, *March 10, 1906.*

To the Wabash Railroad Company:

Take notice that:

Whereas, The Secretary of War has good reason to believe that the draw bridge, commonly known as the Wabash Railway Bridge, owned or operated by The Wabash Railroad Company, *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable

obstruction to the free navigation of the said Mississippi River (which is one of the navigable waterways of the United States) on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers; there being difficulty in passing the draw openings or draw spans of such bridge by rafts, steamboats, or other water craft;

And whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy, and unobstructed, to-wit:

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot pier to be cut down and converted into an east draw-rest pier; the present draw span to be moved west; new and solid long or protection piers, of crib work, to be built above and below the new pivot pier; the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw openings on the new location of drawspan to give at all stages of the river a clear width of water-way of
240 not less than one hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of rip rap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers;

And whereas, To March 15, 1907, is a reasonable time in which to alter the said bridge as described above;

Now, therefore, In obedience to, and by virtue of, section eighteen of an Act of the Congress of the United States entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899 (30 Stat. L., 1153), the Secretary of War hereby notifies the said Wabash Railroad Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15, 1907.

ROBERT SILAW OLIVER.

Asst Secretary of War.

241 DISTRICT ATTORNEY: I also offer and read in evidence the affidavit attached thereto, dated March 16, 1906, which reads as follows:

"To Retain.

Notice to Alter Bridge.

W. H. Bixby, Lt. Col. Corps of Engineers, U. S. A., being duly sworn, on his oath states that he made service of the within notice on the Wabash Railroad Company, by personally delivering a duplicate thereof to President, F. A. Delano of said company at Western Union Building, Chicago, Ill., on the 16th day of March, 1906.

W. H. BIXBY.

Subscribed and sworn to this 17th day of March, 1906, before me.

[SEAL.]

OSCAR MOLLER,
Notary Public, Cook Co."

Mr. MINNIS: That is objected to for the reason that the certified copy under the Act of Congress is proof of all that the writ would show. My objection is, that the writ would not show service on the defendant, the Wabash Railroad Company.

The COURT: The objection is overruled.

To which ruling of the Court the defendants, by their counsel, then and there, at the time, duly excepted.

242 Colonel BLODGETT: I would like to make objection to this effect: If they had here what purported to be the original paper it would devolve upon the Government, in order to show a valid service upon the defendants, or either of them, to prove that it was signed by the party by whom it purports to have been signed. If that was offered in a criminal case somebody would say, "Does that prove itself?" "Does that prove it was signed by Robert Shaw Oliver, because it has his name attached?" We are entitled to have it proven here that the original paper was signed by Robert Shaw Oliver. I make the objection because it does not appear that the originals of any of these papers were signed by Mr. Oliver.

The COURT: In my judgment it is not necessary that they should bring the original papers from the War Office, when the Secretary of War certifies to the correctness of these copies. As I understand it, these original papers become part and parcel of the records of the War Department, and the Act of Congress authorizes a copy of any paper certified by the Secretary of War to be on file in his office, to be competent and proper evidence in any case.

Colonel BLODGETT: I agree that they can be used in evidence to the extent the statute says: "Copies in" etc, down to "equally with the originals thereof."

Now I say if they offered the original thereof, the mere offering or presentation of a paper signed "Robert Shaw Oliver" would not prove it was signed by Robert Shaw Oliver; but somebody

243 would have to testify that it was his signature.

The COURT: You do not make it a point that this is a copy? You say of the original, if it were here, that they must have some witness to prove it was Robert Shaw Oliver's signature.

Colonel BLODGETT: Yes, your Honor.

The COURT: The objection is overruled.

To which ruling the defendants excepted.

Mr. MOFFAT: For the same reasons I wish to make the objections and move that the other papers which have been read here be stricken out; that if the originals were here they could not be used with any greater force than these copies.

The COURT: The motion is denied.

To which ruling of the Court the defendants, by their counsel, then and there, at the time, duly excepted.

DISTRICT ATTORNEY: I now offer in evidence a part of Government Exhibit 4, being letter addressed to the Honorable Wm. H.

Taft, Secretary of War, Washington, D. C., dated March 26, 1906—

Mr. MOFFAT: We have now gotten to that point in the Government's case where he claims to have proven the issuance of the notice and service of the notice on the defendants. Anything occurring in the War Department subsequent to that date cannot have any bearing upon the issues raised by this information—was there
244 a valid order? And was it obeyed? Therefore we object to any paper appearing on file in the War Department and particularly to the paper the District Attorney now offers, dated March 26, 1906.

The COURT: I do not know what is in this paper he is going to offer.

Mr. MOFFAT: I do.

The COURT: You say nothing after the notice and service is competent: Suppose you appeared before the Department and recognized the order and undertook to get the order changed: Would that be effective?

Mr. MOFFAT: It would be absolutely immaterial.

The COURT: I do not think so. I think he can prove an offense after commission as well as before.

Mr. MOFFAT: I object to its admission, on behalf of all defendants, for the reasons stated.

The COURT: The objection is overruled and motion denied.

To which ruling of the Court defendants, by their counsel, then and there, at the time, duly excepted.

DISTRICT ATTORNEY: I now offer in evidence part of Government Exhibit No. 4, being letter addressed to the Honorable Wm. H. Taft, Secretary of War, Washington, D. C., dated March 23, 1906.

The paper referred to is in the words and figures following, to-wit:

245

WASHINGTON, D. C., *March 23, 1906.*

Hon. William H. Taft, Secretary of War, Washington, D. C.

MY DEAR SIR: In the matter of the Hannibal bridge across the Mississippi at Hannibal, Missouri, I beg leave to call your attention to the following facts:

In October last, after a conversation with you, I sent you a written application for a hearing by you before any action was taken by the War Department in relation to changes in the bridge above referred to as provided by the United States Revised Statutes. A notice was served upon the Wabash Railroad Company, and the Bridge Company to appear before a Major Riche at Keokuk, Iowa, I think.

Evidence was produced by affidavits and otherwise before Major Ritchie, briefs filed and the matter argued. Col. George H. Mahan of Hannibal, Mo., who represented the Wabash Railroad and the Bridge Company at that hearing informs us that he has applied three times to Major Ritchie for information as to his decision, and requested that he be notified by Major Ritchie thereof. But has been unable to obtain any information from Major Ritchie up to date.

A few days since without a hearing by you, a notice signed by General Oliver, Assistant Secretary of War, dated March 10th, was served on the Bridge Company and the Wabash R. R. Co., ordering changes in the bridge of an estimated cost of
246 \$160,000.

In view of the facts set forth that Major Ritchie has not seen fit to communicate his decision to the parties interested, although so requested to do, and in view of the fact that there are legal questions involved on which (with all respect) he is unsuited to pass, and that we have not had a hearing by you, provided for by law and asked for by us, I have the honor to request that the order of March 10th, by General Oliver be annulled, and that a hearing be granted us by you, at a date to be fixed.

President Delano, Vice-President Blodgett of the Wabash R. R. Co., and Col. George A. Mahan of Hannibal, desire to be present at the hearing. As Mr. Delano has numerous engagements in the near future, I respectfully request that the hearing be set for such time in April as may suit your convenience, the later in the month, the better, to allow time for preparation and examination of Major Ritchie's report of which I respectfully request that you order copies to be sent, General Wells H. Blodgett, St. Louis, Missouri, Col. George H. Mahan, Hannibal, Missouri and myself. If you will be good enough to notify me at Toledo, Ohio, as soon as convenient of the date set for the hearing, I will notify the others named.

I have the honor to be,

Very respectfully,

N. H. SWAYNE.

247 Mr. MINNIS: In behalf of the Wabash Railroad Company

I object to the admission of that paper, because Mr. Swayne does not represent the Wabash Railroad Company. His statement as to the Wabash Railroad Company is mere hearsay.

DISTRICT ATTORNEY: Whom does he represent?

Mr. MINNIS: I don't know.

Mr. MOFFAT: On behalf of the Hannibal Bridge Company I move to strike out that paper as immaterial and irrelevant, on the ground there is no evidence whatever that the writer had any right to represent the Hannibal Bridge Company, and cannot prove his agency by his own letter.

The COURT: The objection is overruled.

To which ruling of the Court the defendants, by their counsel, then and there, at the time, duly excepted.

DISTRICT ATTORNEY: I now read the endorsement stating that the Secretary of War desired to grant the rehearing.

Mr. MOFFAT: Objected to on the same grounds stated before, that it is immaterial to any of the issues involved in this information.

The COURT: The objection is overruled.

To which ruling of the Court, the defendants, by their counsel, then and there, at the time, duly excepted.

248 DISTRICT ATTORNEY: The endorsement referred to reads as follows:

WAR DEPARTMENT,
OFFICE OF THE SECRETARY.*Memorandum for the Chief of Engineers.*

Letter of N. H. Swayne *in re* matter of the Hannibal Bridge across the Mississippi River at Hannibal, Mo.

The Secretary of War desires to give a hearing in this case.

FRED CARPENTER,
Private Secretary.

March 26, 1906."

DISTRICT ATTORNEY: I now offer and read in evidence the endorsement of Brigadier General A. Mackenzie, under date of March 28, 1906, to the Secretary of War.

MR. MOFFAT: To the admission of this endorsement we make the same objection and move to strike it out for the same reasons above stated.

THE COURT: The objection is overruled.

To which ruling of the Court the defendants, by their counsel, then and there, at the time, duly excepted.

DISTRICT ATTORNEY: The endorsement referred to is in the words and figures following, to-wit:

249

2nd Indorsement.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, March 28, 1906.

1. Respectfully returned to the Secretary of War.
2. The hearing in the matter of the Hannibal Bridge was public and the voluminous papers and legal presentation show that all the evidence in the case was the common possession of both parties to the controversy. The report submitted by Maj. C. S. Riche, Corps of Engineers, was not a decision, but simply his opinion, and all the facts upon which his opinion was based were before the War Department. The matter was given full consideration irrespective of such report.
3. I know of no reason why he should have been expected to furnish a copy of such report direct; but, however, there can be no objection to its being furnished to the representatives of the bridge company, and a press copy is herewith, and if the same meets with the approval of the Secretary of War it is suggested that such copy be sent to Mr. Swayne, with authority to have such copies made as he may desire.
4. Assuming that the Secretary of War intends to give a personal hearing in this matter, I make the suggestion that the complainants against the bridge be offered an opportunity to present their side of the case.
5. The matter has been before the district engineer officer for many years and in connection with latest complaints was under

250 consideration for nearly a year; and the public hearing required by law and the orders of the Department has already been held by the district officer.

6. The complaint upon which the present action was taken was filed by Capt. John Killen, Superintendent, Diamond Jo Line Steamers, whose address is Dubuque, Iowa. He is doubtless informed as to others interested in the matter who would wish to be represented at any further hearing.

7. If authorized to do so, I could also cause public notice of the intended action to be given through the engineer office at Rock Island, Ill.

A. MACKENZIE,

Brig. Gen., Chief of Engineers, U. S. Army.

251 DISTRICT ATTORNEY: I now offer in evidence the letter dated April 21st, 1906 of Rob't Shaw Oliver, Assistant Secretary of War, to Mr. N. H. Swayne, informing him of the reference to the Judge-Advocate General for a re-hearing.

Mr. MOFFAT: Objected to on the same grounds stated before, that it is immaterial to any of the issues involved in this information; and we move to strike out the paper as immaterial and irrelevant.

The COURT: The objection is overruled.

To which ruling of the Court the defendants, by their counsel, then and there, at the time, duly excepted.

The paper referred to is in the words and figures following, to-wit:

252

WAR DEPARTMENT,

WASHINGTON, April 21, 1906.

SIR: Referring to your letter of 26th ultimo, in which you request a personal hearing before final action is taken in the matter of the Hannibal Bridge across the Mississippi River at Hannibal, Mo., I beg to inform you that Secretary Taft has authorized the Judge-Advocate General of the Army to afford a personal hearing to interested parties, after duly advising them of the date thereof.

In further compliance with your request, a copy of the report of Major Riche is transmitted herewith, and you are hereby authorized to make as many copies thereof as may be necessary.

Very respectfully,

ROBERT SHAW OLIVER,

Assistant Secretary of War.

Mr. N. H. Swayne, Toledo, Ohio.

253 DISTRICT ATTORNEY: I now offer in evidence the order to the Judge-Advocate General, dated April 9, 1906, to conduct hearing in the Hannibal Bridge matter.

Mr. MOFFAT: Objected to on the grounds stated before, that it is immaterial to any of the issues involved in this information; and we move to strike out the paper as immaterial and irrelevant.

The COURT: The objection is overruled.

To which ruling of the Court the defendants, by their counsel, then and there, at the time, duly excepted.

The paper referred to is in the words and figures following, to-wit:

254

WAR DEPARTMENT,
OFFICE OF THE SECRETARY.

Memorandum for the Judge-Advocate General.

Correspondence in Case of Hannibal Bridge.

The Secretary of War wishes to give the parties a rehearing in the Hannibal Bridge matter. He is so pressed with other matters that he is not able to attend to it personally and desires you to hear them. Will you please fix the date and notify the parties?

FRED W. CARPENTER,
Private Secretary.

April 9, 1906.

255 DISTRICT ATTORNEY: I now offer in evidence the report of the Judge Advocate General on the re-hearing which he held, and the report which he made thereon to the Secretary of War May 15, 1906.

MR. MOFFAT: Objected to on the grounds stated before, that it is immaterial to any of the issues involved in this information; and will move to strike out the paper as immaterial and irrelevant.

THE COURT: The objection is overruled.

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

The paper referred to is in the words and figures following, to-wit:

256

WAR DEPARTMENT,
OFFICE OF THE JUDGE-ADVOCATE GENERAL,
WASHINGTON, May 15, 1906.

To the Honorable The Secretary of War.

SIR: I beg leave to submit the following report upon the hearing given to parties in interest in the matter of the Hannibal Bridge across the Mississippi River at Hannibal, Missouri, in which, under authority conferred by Section 18 of the Act of March 3, 1899 (30 Stat. L., 1153), certain changes have been ordered to be made with a view to render navigation through or under it reasonably free, easy and unobstructed.

Seasonable notice was given to the owners of the bridge and to those interested in the navigation of the river, and May 10th was fixed upon by this office, and accepted by all parties, as a convenient date for such hearing. On May 10th, the day appointed for the hearing, the bridge company was represented by Mr. F. A. Delano, the president of the Wabash Railroad Company; by Colonel George A. Mahan of Hannibal, Missouri; and by Mr. Hayes, a law partner of Noah H. Swayne, Esq., of Toledo, Ohio. No representative of the river interests was present. At the hearing parties were advised that the case would finally have to be determined by the Secretary of War, and that for that reason it was highly desirable that there

257 should be a very full written presentation of their views. President Delano of the Wabash Railroad submitted and read a written argument, showing why the bridge company should not be required to make the alterations which were embodied in the notice of the Secretary of War. He was followed by Colonel Mahan, who concluded in behalf of the bridge company. Mr. Hayes did not desire to be heard, but assured me that he was satisfied with the presentation that had been made in behalf of the bridge company by President Delano and Colonel Mahan.

With a view to secure a full presentation of the case in behalf of the appellants from the Secretary's order, I invited their attention to the recent decision of the Supreme Court in the case of the Chicago, Burlington & Quincy Railway Company *vs.* the Commissioners of Drainage District, which was handed down on February 19, 1906. I also drew their attention to an opinion of the Attorney General in the Ohio Bridge Cases, which will be found at page 194 of Volume XXV, Opinions of the Attorneys-General, and fixed upon Saturday, the 12th instant, as a convenient time upon which to submit anything that they desired to present in writing in connection with the matter before the Department.

The following briefs and papers have been submitted:

1. Statement of F. A. Delano, President of the Wabash Railroad Company.
2. Supplementary brief of Col. George A. Mahan, in behalf of the owners of the Hannibal Bridge.

The foregoing were in addition to the following, which were submitted at the original hearing:

- 258
1. Protest against changes in Hannibal Bridge, by Colonel George A. Mahan, counsel for bridge company.
 2. Reply of Hughes & Sawyer, in behalf of the Diamond Jo line of steamers.
 3. Brief of Colonel George A. Mahan, in reply to Hughes & Sawyer.
 4. Report of Major C. S. Riche, Engineer Corps, Engineer Officer of District.
 5. Report of C. A. Durham, Assistant U. S. Engineer.

An ample opportunity for the reception of testimony and for expression of views seems to have been afforded at the original hearing to the representatives of all the interests involved. The testimony, as is usual in such cases, shows a strong bias in favor of the interests of the *interests* of the witnesses. Several engineers of standing, among them Messrs. Corthell and Parkhurst, were produced by the bridge company and expressed the view that the bridge, as constructed in conformity to the Act of 1866, is not a material obstruction to navigation.

In a case like that in reference the relative value and importance of the land and water borne commerce must be considered, and the conclusion usually reached in that regard presents itself in this case; that is that the movement by rail across the river vastly exceeds in value the importance that carried on the river itself. But this test, although important, is not decisive. Commerce by river, equally

with that by rail, has a right to exist and comes within the protecting care and regulation of Congress.

It may even be conceded that the expense which the railroad will have to incur in order to meet the order of the Department is
 259 excessive; but the fact remains that Congress, in authorizing the erection of the bridge, permitted the establishment of an obstruction to navigation and, at the same time, gave expression to its views as to the relative importance of the traffic which passed over and under the bridge. This conclusion, with its attendant conditions, was accepted by those who constructed the bridge.

Measured by the number of accidents that have occurred in recent years to boats attempting to pass the draw, I think it must be conceded that the bridge is becoming less important as a menace.

The statute provides that:

"Whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed."

Sec. 18, Act of March 3, 1899 (30 Stat. L., 1153).

While there is considerable doubt as to whether the bridge, as constructed, is "an unreasonable obstruction to the free navigation of such waters," for any of the reasons stated, I think it is established in evidence that "there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft," and that, for that reason, the order directing alterations was properly issued.

It is proper to observe, also, that the difficulty of passing the
 260 bridge, at high stages of water, has been added to by Congress in authorizing the construction of the Sny Levee on the left bank of the river, a short distance above the bridge; the operation of the levee being to reduce the width of the river at high water, and cause a considerable volume of water to pass under the bridge, which formerly overflowed on the Illinois side. This consideration, whatever force may be assigned to it in the determination of the question involved, makes in favor of, or operates to diminish the liability of the bridge company.

It should also be borne in mind that the draw, which is required to be 160 feet in width, in the clear, is in fact 157.5 feet wide at the top of the piers; 156.5 at high water; and 146.5 feet wide at low water (Report of Major Riche, Jan. 13, 1906, p. 3). That this is not a mere technical irregularity will appear from the fact that, in a case arising under the same statute which authorized the construction of the Hannibal Bridge, it was held by the Supreme Court that a draw

opening in the Kansas City bridge of 153 feet in width, instead of 160 feet in the clear, gave the bridge the character of an unlawful structure (Hannibal and St. Joseph Railroad Company *v.* Missouri River Packet Company: 125 U. S., 260).

In passing upon the application to this case of Section 18 of the Act of March 3, 1899, considerable light is thrown upon the matter by the opinion rendered by the Attorney-General in the Ohio River Bridge Cases. The bridge in reference was constructed under authority conferred by the Act of July 25, 1866, which provides that:

261 "Any bridge built under the provisions of this Act may, at the option of the company building the same, be built as a drawbridge, with a pivot or other form of draw, or with unbroken or continuous spans: *Provided*: That if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation in any case than fifty feet above extreme high-water mark, as understood at the point of location, to the bottom chord of the bridge, nor shall the spans of said bridge be less than two hundred and fifty feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river and not less than three hundred feet in length:

And Provided also, That if any bridge built under this act shall be constructed as a drawbridge, the same shall be constructed as a pivot drawbridge with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length on the clear of each side of the central or pivot pier of the draw, and the next adjoining spans to the draw shall not be less than two hundred and fifty feet; and said spans shall not be less than thirty feet above low-water mark, and not less than ten feet above extreme high-water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current of the river."

Sec. 2, Act of July 25, 1866 (14 Stat. L., 241).

A later section of the same enactment contains the requirement that:

"The right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved."

Sec. 13, *ibid.*

In the opinion rendered by the Attorney General it was said, in speaking of the statutory proviso similar to that above cited, that:

"The meaning and effect of this proviso would seem to be clear. Like the provisions as to the dimensions of the bridge, it is one of the conditions upon which the bridge was authorized to be built and its character as a lawful structure depended. If not built of the required height, width of span, etc., the bridge would be an unlawful structure; and although all other requirements were complied with, if built so as to interrupt the navigation of the river, it would still be unlawful. But *when* constructed in accordance with the prescribed conditions, and so as not to interrupt the navigation of the river, the

bridge became *ipso facto*, as declared in the Act, a lawful structure. The question whether it was so constructed as not to interrupt the navigation of the river was necessarily to be determined by the requirements of navigation at that time. It could not be made dependent upon the needs of future navigation, without practically annulling the declaration that "the bridge erected under the provisions of this act shall be a lawful structure."

(XV Opins. Atty. Gen., 209).

It was also his view that such a reservation as that above described,—

"places beyond question the power of Congress to require the alterations of any bridge constructed, under their authority, at the cost and expense of the owners thereof, without compensation, in order to prevent or remove all material obstructions to the navigation of said river."

(*Ibid.*, p. 210.)

It was the view of the Attorney General that the power to amend which was reserved to Congress, could be exercised in an act of legislation expressly made applicable to a particular bridge, or in general legislation, to the same end, in which a measure of the authority vested in Congress by the Constitution could be delegated to and exercised by the Secretary of War, as in the case of Section 18 of the Act of March 3, 1899, and prior legislation *in pari materia*. On this point the Attorney General says:

"The only difference between that and the present case is this: In that case the right to *build* a bridge was made to depend upon the determination of the Secretary of War that it would not injuriously obstruct navigation. In the present case the right to *maintain* a bridge already built is made so to depend. But this difference does not affect the character of the power devolved upon the Secretary. If administrative in the one case it must be so in the other. The fact that the Act of March 3 1899, refers to existing bridges lawfully erected, concerns only the power of Congress to require their alterations or removal. As we have seen, that power necessarily exists in Congress, the only question which can arise being whether the alteration or removal of a bridge *shall be at the expense of the Government or of the bridge owner.*

263 So far as respects bridges constructed under the authority of the acts of December 17, 1872, and February 14, 1883, this latter question is settled by the express reservation therein of the right to alter, amend, or repeal the acts so as to prevent or remove all material obstruction to navigation without liability on the part of the Government. It is the ascertainment of this contingency merely that has been devolved upon the Secretary of War by the Act of March 3, 1899. The efficiency of that act as a declaration of legislative will necessarily comes from Congress."

(*Ibid.*, p. 215.)

In conclusion the Attorney General says, after a very full and exhaustive discussion of the authorities:

"In view of these authorities, I have no hesitancy whatever in saying that the authority conferred upon the Secretary of War by Section 18 of the Act of March 3, 1899, is a lawful delegation of power.

"It will be observed that the Act in question does not authorize the Secretary of War to act arbitrarily. The party concerned is entitled to a hearing; to receive notice and a specification of the alterations required, and to have a reasonable time in which to make the prescribed changes. Not until all these steps have been taken does a willful failure to comply with the directions of the Secretary become a punishable offense."

(*Ibid.*, p. 218.)

It is therefore my conclusion that the case presented comes within the operation of Section 18 of the Act of March 3, 1899, and that the action heretofore taken by the Department should be adhered to.

Very respectfully,

GEO. B. DAVIS,
Judge-Advocate General.

Approved.

Let the Chief of Engineers act accordingly.

WM. H. TAFT,
Sec'y of War.

July 14, 1906.

264 DISTRICT ATTORNEY: I also offer the following endorsement

"Approved. Let the Chief of Engineers act accordingly.

WM. H. TAFT,
Sec'y of War."

July 14, 1906.

Mr. MOFFAT: Objected to for the reason that it is immaterial to any of the issues involved in this information; and we move to strike out the paper as immaterial and irrelevant.

The COURT: The objection is overruled.

To which ruling of the Court the defendants, by their counsel, then and there, at the time, duly excepted.

DISTRICT ATTORNEY: I call attention to the letters of Robert Shaw Oliver, Acting Secretary of War, under date of July 20, 1906, advising as to the action of the Secretary of War.

Mr. MOFFAT: Objected to on the grounds stated before; that it is immaterial to any of the issues involved in this information; and we move to strike out the paper as immaterial and irrelevant.

The COURT: The objection is overruled.

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

265 The papers referred to are in the words and figures following, to-wit:

266 8247

WAR DEPARTMENT,
WASHINGTON, *July 20, 1906.*

SIR: In connection with previous correspondence on the subject, I beg to inform you that under date of July 14th instant, the Secretary of War approved the conclusions reached by the Judge-Advocate General of the Army, as a result of the re-hearing, to the effect that the previous action of the Department ordering certain changes in the Hannibal bridge across the Mississippi River at Hannibal, Mo., with a view to rendering navigation through or under it easy, free and unobstructed, should stand, and action be taken accordingly.

Very respectfully,

ROBERT SHAW OLIVER,
Acting Secretary of War.

Geo. A. Mahan, Esq., Attorney for the Hannibal Bridge Company,
Hannibal, Mo.

267 8247

WAR DEPARTMENT,
WASHINGTON, *July 20, 1906.*

SIR: In connection with previous correspondence on the subject, I beg to inform you that under date of July 14th instant, the Secretary of War approved the conclusions reached by the Judge-Advocate General of the Army, as a result of the re-hearing, to the effect that the previous action of the Department ordering certain changes in the Hannibal bridge across the Mississippi River at Hannibal, Mo., with a view to rendering navigation through or under it easy, free and unobstructed, should stand, and action be taken accordingly.

Very respectfully,

ROBERT SHAW OLIVER,
Acting Secretary of War.

Mr. F. A. Delano, President, Wabash Railroad Company, Western
Union Building, Chicago, Ill.

268 8247.

WAR DEPARTMENT,
WASHINGTON, *July 20, 1906.*

SIR: In connection with previous correspondence on the subject, I beg to inform you that under date of July 14th instant, the Secretary of War approved the conclusions reached by the Judge-Advocate General of the Army, as a result of the re-hearing, to the effect that the previous action of the Department ordering certain changes in the Hannibal Bridge across the Mississippi River at Hannibal, Mo., with a view to rendering navigation through or under it easy, free and unobstructed, should stand, and action be taken accordingly.

Very respectfully,

ROBERT SHAW OLIVER,
Acting Secretary of War.

Noah H. Swayne, Esq., Attorney-at-Law, 49 Produce Exchange,
Toledo, Ohio.

269 DISTRICT ATTORNEY: I now offer in evidence the original copies of the transcript of the evidence taken at the Rock Island hearing, various statements and affidavits that were introduced at that time in the hearing of this case at Rock Island before Major Riché, for the purpose and only for the purpose of showing that at that hearing there was evidence introduced both on behalf of the Hannibal Bridge Company and on behalf of the Government. I will not take the time of the Court to read this, as it would take several days; but I ask that it be considered in evidence. This includes evidence taken on behalf of both companies.

MR. MINNIS: It is the proceeding that culminated in the notice of March 10, 1906?

DISTRICT ATTORNEY: Yes, and it is offered for the purpose of showing that the War Department did not act without evidence.

MR. MOFFAT: I think it would conduce to the clearness of the record to specify what papers are so offered. I don't think it is necessary to read all these papers, but we understand all the papers are there and at the end of the case we can specify them and then mark them as offered in evidence at this period of the case.

THE COURT: The real purpose of the District Attorney is to show there was a hearing at Rock Island had at the place designated and certain papers or other proof taken, and if that is so admitted, do not know that it would be necessary to introduce any
270 evidence.

MR. MOFFAT: Oh, yes, there is another point in connection with these affidavits and maps, and that is this: The only competency of the papers already read from the War Department, are that they constitute a part of the record from which the order was made. Part of a record cannot be competent. I only suggest that we can after adjournment simply make a list of what they are, and give it to the stenographer and embody them at this part of the case, as part of the case.

DISTRICT ATTORNEY: That was my own purpose.

271 UNITED STATES EXHIBIT 5 is in the words and figures following to-wit:

Public meeting and hearing held at the United States Engineer's Office, in the City of Rock Island, in the State of Illinois, on Tuesday, June 6th, A. D. 1905, beginning at the hour of ten o'clock A. M., as to whether or not the bridge across the Mississippi River at Hannibal Missouri, between the States of Illinois and Missouri, has been, was, and now is an obstruction to navigation; which public meeting and hearing was had and held pursuant to a precept therefor issued by the authority of the Secretary of War of the United States of America, dated the 9th day of Feb. A. D. 1905.

PRESENT: Major C. S. Riche, U. S. Corps of Engineers, presiding; Montgomery Meigs, U. S. Civil Engineer; Washington Hight, Rapids Pilot; Campbell Hunt, Pilot; Capt. George Lamont.

George A. Mahan Esq. Attorney for Hannibal Bridge Co.

Richard A. Hayes, representing stockholders of the Hannibal Bridge Company.

T. M. Strain, representing Hannibal Bridge Co.

A. O. Cunningham, Bridge Engineer of the Wabash Railway Company.

The meeting being duly called to order by the Presiding Officer, he said:

Major RICHE: This meeting is called in response to a letter and petition submitted by Mr. John Killeen, Superintendent of the Diamond Jo Line. Now I have a great many documents and so forth here that I can either read or you gentlemen can look over. Probably it will be easier for the Wabash people to look them over. It will take quite a while to read them.

Mr. MAHAN: We can look them over.

Major RICHE: In order that we may proceed properly, it might be well for each of the gentlemen present to give his name to the reporter and what interest he represents so that we may proceed in an orderly manner and we may know in what interest each appears.

Mr. MAHAN: My name is George A. Mahan and I appear as attorney for the Hannibal Bridge Company. Richard A. Hayes and T. M. Strain also appear for the Hannibal Bridge Company. A. O. Cunningham is Bridge Engineer for the Wabash Railway Company, and the Bridge Company has requested his presence to explain any matters within his knowledge concerning the bridge.

Mr. RICHE: The other gentlemen present are Captain George Lamont, Washington Hight and Campbell Hunt, Mississippi River pilots representing the interests of the navigators, and Montgomery Meigs, United States Civil Engineer.

Major RICHE: We will first lay before you the letter or petition Killeen to the Secretary of War of the United

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either with the endorsements thereon, by virtue of which a hearing is held. Mr. Meigs will read these papers. I will first read the letter from the Diamond Jo

273 Line (Letter read). I will now read the endorsements (Endorsements read down to the report therein referred to.)

Here is the report which I had better read in this connection. (Report read.)

Mr. HAYES: Whose report was that just read?

Major RICHE: That was the report of Major Lusk, my predecessor.

Mr. MEIGS: We now come to the fourth endorsement which I will read. (Endorsement read.)

Mr. MEIGS: The fifth endorsement is as follows: (Fifth endorsement read.)

Mr. MEIGS: The sixth endorsement reads as follows: (Sixth endorsement read.)

Major RICHE: Now it is under that endorsement that this meeting is being held. I presume you are all familiar with the law governing the case.

Mr. MAHAN: We want to file at the proper time a communica-

tion and file a protest and some affidavits that may be considered as a part of this proceeding. You suggested to me, Major that you would prefer to have that in writing.

Major RICHE: Yes sir: Before this meeting was called circulars were sent out to pilots and steamboat captains and other river men and a great number of responses have come in from them giving information and making suggestions. I think it might be well to go over these now.. If you wish to see them and examine them before we read them you may do so. If you wish to see them before writing your paper, protest or petition or communication you may do so.

Mr. MAHAN: We do not care to wait for that. All we want is to get our papers in the record. It is immaterial as to when that is done. We have some affidavits ready to file now.

Major RICHE: I will take them in right after reading these responses.

Mr. MAHAN: Very well.

Major RICHE: Major Lusk sent these circulars out and these are the responses that have been received. The circular will first be read.

Mr. MEIGS: I will read the form of circular sent out. It is as follows:

U. S. ENGINEER OFFICE,
ROCK ISLAND, ILL., *March 25, 1905.*

DEAR SIR: There have been referred to this office for action, several petitions, addressed to the Secretary of War and signed by vessel-owners, masters, pilots, and other- interested in the navigation of the Upper Mississippi River. These petitions set forth that the bridge over the Mississippi River at Hannibal, Missouri, in its present condition, is an unreasonable obstruction to the free navigation of the said river, by reason of the location of the existing draw-openings, the absence of guard-fences or sheer-booms, and the presence of artificial deposits of stone about the piers. The petitions request the Secretary of War, under the authority vested in him by law, and after a due hearing of all interested persons or corporations, to require such alterations to be made in and about the said
275 bridge as will render navigation through it reasonably free, easy and unobstructed.

From the records of former hearings and inquiries in regard to this bridge, it appears to be the prevailing opinions of navigators that the following changes in the Hannibal bridge are necessary to afford suitable relief to navigation:

"The west draw-pier (first pier from Missouri shore), to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot-pier; and proper guard fences to be built along the Missouri shore above and below the new shore-pier.

"Each of the draw-openings on the new location of draw span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

"The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers."

Such changes in the Hannibal bridge as those described above are important, and to secure them Congressional action may be required. It is therefore necessary that the presentation of the matter be made full and complete. To secure the needful information on this point I would ask for replies to the following
276 questions, and also for such additional remarks as you may be willing to make.

JAS. L. LUSK,
Major, Corps of Engineers.

SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

2. Do you consider the Hannibal Bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

277 6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

7. Can you give other facts having a bearing on the question?

Major RICHE: That is the circular to which responses have been made. I will give you one of these so that you can follow the questions in the circular as the answers are made. The first response is from Capt. A. J. Whitney, Rock Island, Illinois, and is as follows:—

Mr. MEIGS: This response is as follows: (Whitney's response read.)

Mr. MEIGS: The next is from Capt. W. H. Whisler. (Response read.)

Mr. MEIGS: The next is from Perry M. Ruby, Captain, Davenport, Iowa. (Response read.)

Major RICHE: The next is from Bronson Co.; they answer first question "No" and consequently do not answer the balance of the questions.

278 Mr. MEIGS: I now read the response of Capt. Jesse D. Mefford. (Response read.)

Mr. MEIGS: The next response is from Capt. John O'Connor of Rock Island, Illinois. Mefford is located at Quincy Illinois (Response read.)

Mr. MEIGS: The next response is from E. F. Alden, Secretary of Empire Coal Company of Clinton, Iowa. (Response read.)

Mr. MEIGS: The next reply is from Capt. Jacob Richtman of Nauvoo, Illinois. (Reply read.)

Mr. MEIGS: The next reply is from Capt. W. R. Tibballs, of Dubuque, Iowa. (Response read.)

Mr. MEIGS: The next response is from John Killeen, Superintendent of the Diamond Jo Line, Dubuque, Iowa. (Response read.)

Mr. MEIGS: Here is a reply from Capt. N. D. Patterson, of Clinton Iowa. (Response read.)

Mr. MEIGS: This response is from Capt. R. H. Tromley of Dubuque Iowa. (Response read.)

Mr. MEIGS: This letter is from Capt. James J. Richtman, of Nauvoo, Illinois. (Response read.)

Mr. MEIGS: This response is from Harry Clark, St. Paul, Minn. Gen. Agent Diamond Jo Line. (Response read.)

Mr. MEIGS: Here is a response from Capt. Lou Bryson, of Davenport, Iowa. (Response read.)

Mr. MEIGS: Here is one from Campbell Hunt of the U. S. Str. Lily. (Response read.) I saw Mr Hunt last night and he said that in his reply he had forgotten one thing, one accident that occurred at the bridge, and that is, that the Andy Johnson sunk a large loaded, I think, with meat; that was a total loss.

279 Mr. MEIGS: Here is one from Capt. S. H. Dolson, of Dubuque, Iowa. (Response read.)

Mr. MEIGS: The next is from Capt. William Burke of St. Louis, Mo. (Response read.)

Mr. MEIGS: The next is from Capt. Ira A. Fuller of Pepin, Wis. (Response read.)

Mr. MEIGS: We have one from Capt. A. F. Hollingshead, Lumber raft boat-man of Clinton, Iowa. (Response read.)

Mr. MEIGS: Capt. W. A. Blair, Steamboat owner of Davenport, Iowa, makes this response. (Response read.)

Mr. MEIGS: Capt. M. S. Dillon, of LaCrosse, Wis., makes this response. (Reply read.)

Mr. MEIGS: We have the following reply from C. Lamb & Sons of Clinton, Iowa. (Response read.)

Mr. MEIGS: Capt. C. P. Martin of St. Louis, Missouri, makes response as follows: (Response read.)

Mr. MEIGS: Capt. H. S. Brown, Steamboat owner of Quincy, Illinois, in addition to replying on the circular adds a letter which is attached to and forms a part of his reply.

Major RICHE: There is a letter as you say there, that you may read first.

Mr. MEIGS: I will read the letter in connection with the answers. (Letter and answers read.).

Mr. MEIGS: Here is one from L. Lamb of Clinton, Iowa. (Response read).

Mr. MEIGS: Capt. H. H. Pollock of Rock Island, Illinois, makes the following reply. (Response read).

Mr. MEIGS: Capt. Henry Leyhe, of St. Louis, Missouri, replies as follows: (Response read).

280 Mr. MEIGS: We also have a response from Capt. William Leyhe as follows; he also is from St. Louis. (Response read).

Mr. MEIGS: Here is a response from Capt. John F. Adams, of Quincy, Illinois. He was the captain of the last boat sunk there. (Response read.)

Mr. MEIGS: The last response is from Capt. J. M. Richtman of Nauvoo, Illinois. (Response read).

Mr. MEIGS: We also have a letter from Capt. Perry M. Ruby which is pertinent to this inquiry and I will read it. (Letter read).

Major RICHE: Is there any one else who wishes to make any remarks in line with the petition.

Mr. MEIGS: I would like to ask Campbell Hunt a question. You mentioned to me last night the loss of a barge, didn't you, an extra damage that you had forgotten to mention in your reply.

Mr. HUNT: The Johnson lost a barge with part of a load of meat, of bulk meat. But I could not tell you what time it was. That is the only one that I know of that I had forgotten.

Mr. MEIGS: You omitted that from your list of accidents that you remembered and particularized?

A. Yes sir, I omitted that.

Capt. HIGHT: I haven't had a chance to make any statement in this case at all.

Major RICHE: If there is anything you would like to state Captain, you have an opportunity to do it right now.

Mr. MEIGS: If we ask him the questions contained in the circular he may answer them *seriatim*.

Major RICHE: That may be the better way.

281 Mr. MEIGS: The first question Captain is: Do your duties now, or have they in former years, required you to run boats, or tows or rafts through the Hannibal Bridge, and are you familiar with the difficulties of navigation at that point?

Captain HIGHT: Yes sir. I am perfectly familiar with the bridge and was in former years. I used to run through it but have not of late years.

Mr. MEIGS: Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

A. Yes sir, very.

Mr. MEIGS: Why?

Captain HIGHT: In the first place, it is in the wrong part of the river, to the east, and in high water especially, the whole river is running in this space; also on account of the construction of the piers, that is, the draw piers, instead of having solid draw piers which would do away with that cross-current, that especially bad whirling—

Mr. MEIGS: That boiling?

Captain HIGHT: It is impossible to hold the vessel there on account of that, even if they had plenty of room. That is one reason on account of that boiling there. That is what makes the boats run so much.

Mr. MEIGS: So unless the steering apparatus unless the rudders have got good solid water they will not work, they are not to be depended on?

Captain HIGHT: Yes sir; Then you strike the draw pier and you break something. There should be a solid draw pier so that there is no chance for it to whirl around there at all and when the boat goes by it will steer all right.

Mr. MEIGS: Now third; what do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

Captain HIGHT: If that draw was closer to the shore and had a sheer-boom so as to drop down any time, night or day. But you can't take the chances of running through that in the night, that is specially in high water; you are liable to do considerable damage.

Mr. MEIGS: It is a dangerous bridge at high water either night or day, but especially dangerous at night?

Captain HIGHT: Yes sir, it is the most dangerous bridge on the river without exception and I have gone through all of them.

Mr. MEIGS: Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Captain HIGHT: Yes sir.

Mr. MEIGS: Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Captain HIGHT: I consider it the most dangerous of any of them and I have been through all of them.

Mr. MEIGS: What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated?

Captain HIGHT: Oh, I could not tell you positively. I know the Dictator sunk there. That was a total loss of part of her barges. I don't remember how many or what the exact loss was. Then the Flying Eagle and the Little Eagle. These three boats were a total loss.

Mr. MEIGS: Do you remember of any of the old line packets that were damaged on the bridge?

Captain HIGHT: I don't remember about that. There might have been. I have been engaged up here for the last 23 years and have not been through the bridge so much as I was in early days.

Major RICHEY: Captain Hight is a pilot over these rapids. He used to be a through pilot, but of late years he has been employed on these rapids.

Mr. MEIGS: Can you give other facts having a bearing on the question?

Captain HIGHT: The construction of that little pier. That makes

a very great difference in the handling of a boat. In high water this boiling up is such that it is almost impossible to hold the boat still.

Mr. MEIGS: Just when the boat gets up where she ought to have the best steerage way she finds her rudders in the midst of the boil.

Captain HIGHT: Just when the boat gets up where she ought to have the best steerage way she finds her rudders in the midst of the boil and she swings one way or the other and she can't do anything because she is in the boil. It ought to be built so that it would not damage anything, break a wheel or anything. It ought to be a solid pier and put in above high water mark.

Mr. MEIGS: There are some boils under that bridge that
284 are due to those rocks down there. There is a big boil down there.

Captain HIGHT: It is where it goes through the open work there where they get where they want to steer.

Mr. MEIGS: The boils above are the most dangerous?

Captain HIGHT: Yes sir, when they get where they want to steer the boat and want to hold her steady, it is almost impossible to do so.

Major RICHE: Is there anything else on that side of the question? If there is not, we would like to hear from the people representing the bridge interest.

Mr. MAHAN: I just have some statements, Major, which I will read or just submit to you as you prefer.

Major RICHE: I would rather have you read them because there may be some discussion on the subject.

Mr. MAHAN: These statements are in the form of affidavits and I will read them. (Statements read.) These are all the affidavits that we have at present. I notice here that there is a great deal of discrepancy with reference to the number of accidents that happened at the bridge. I understand that a careful record was kept of these. I tried to get it so that I could bring it up here but the records were at Springfield Illinois. They have been sent over there. I would like to see if I could not get that statement and have it filed with these affidavits and other statements so that there can be no doubt just about what there was. I think I can get it and I think it would be a correct statement.

Major RICHE: By whom was that record kept.

Mr. MAHAN: By the bridge people, by the man in charge
285 of the bridge.

Major RICHE: How long will it take you to get that?

Mr. MAHAN: I don't know just how long, but not very long. I would like also, if I may be permitted to do so, to file the affidavit of Captain Corthell, who was the first assistant in charge of the bridge under Col. Mason, the engineer who built the bridge. I am not sure that I state his position exactly accurate, but I think he had charge of the building of the bridge. I would have had his affidavit here and filed it, but I didn't find out where he resided until late.

Major RICHE: He is on the advisory board of engineers of the Erie Canal.

Mr. MAHAN: He is living in New York City at No. 1 Nassau street.

Mr. MEIGS: What is his name?

Mr. MAHAN: E. L. Corthell.

Major RICHE: He is still there?

Mr. MAHAN: I don't know what he will say or what he will testify, but I would like to file whatever he does say on the subject; I would like to have the privilege of doing that. Also the affidavit of E. W. Parkhurst.

Major RICHE: On the Illinois Central Railroad now?

Mr. MAHAN: Yes sir. He is, I think, assistant bridge engineer on the Illinois Central. I only found out where he was the latter part of last week. I got information last week that I could trace him up in the general offices of the Illinois Central at Chicago by men working there. He was away and I didn't get information of his whereabouts until last Saturday. It was Sunday morning that I heard by telegram from Mr. Corthell so that I didn't have time to get his statement. So that I didn't have time to get these statements in time to file today but I will file them just as soon as I possibly can.

Major RICHE: I don't know of any reason for not waiting a reasonable time for them.

Mr. MAHAN: It is just possible that after consultation with these gentlemen here I may want to file a statement by them, or some of them, but it will be very brief.

Major RICHE: Have you any further witnesses or documents to offer on the subject.

Mr. MAHAN: No sir. I don't know that I wish to offer anything further.

Mr. STRAIN: There is one thing that I would like to say. There is a statement by some of the officers of the Diamond Jo Line that they lay up on account of the high water and do not risk going through the bridge at such times. I have had charge of the Hannibal bridge for two years and this is the first knowledge that I have had that they have been delayed. I can get the records from my men showing the order and the date that they went up and I can say and will state that they traverse that river in extreme high water in the night time.

Major RICHE: Going down as well as up?

Mr. STRAIN: Our men register the time. Either up or down, whichever direction the boat is going.

Mr. MEIGS: Now excuse me a moment. In regard to the delay mentioned by some of the responses. In such cases they would not go down and lie above the Hannibal bridge with their boats, they would lie at Quincy. They would lie at Quincy until it was day time or in case of high water and it was risky to go through the bridge, until such time as it became safe, and then go down and go through the bridge in daylight or when it was considered safe, so that the bridge men would not necessarily be acquainted with their delay.

Mr. STRAIN: I can show you that they went through there at

night and I can show you the stage of the water at that time that was in the river and the time of night that they went down.

Mr. MEIGS: That would be pertinent, of course.

Mr. STRAIN: The Ella May was mentioned, was it not, in the evidence?

Mr. MEIGS: Yes sir.

Mr. STRAIN: That happened not long ago. I saw the captain of the boat. He didn't know who I was or the men with me. But he told me that he undertook to handle the barge by the side of the boat, had the boat with a barge loaded with lumber or loaded with some thing. The Ella May is a tow boat from down the river somewhere. And he said that when he started to do it he knew that he ought to have the barge ahead, but he thought he could get through all right. He went up and lodged on the flat; after he got off there he tried to go along the river and he landed on the bar in two places and they had to pull him off; his boat would not handle the barge.

Mr. MAHAN: It was generally understood that the Flying Eagle which is mentioned in some the evidence, at the time it took out that excursion was not in proper shape to even venture out on the open river in the condition that the Mississippi River was at the time of the accident. And while I don't want to make any charges against any one, it is generally understood down there at Hannibal

288 that, well, to be explicit, at least one man who was on the boat told me that the manner in which the barge was attached, a heavy barge was attached to this little boat, and the way in which it was attempted to be conducted through the river was very negligent and very careless. I will state further that if that question was gone into, it would be found out that many of these accidents at the bridge were caused by carelessness in the manner of handling the boats. But I don't know, I don't suppose, probably, that you would care to consider that question. So we haven't attempted to go into it at all. I have heard very serious reports of the condition of the officers and men on the Dictator. I lived at Hannibal at the time. I have heard reports that they were not capable at that time of properly handling the boat anywhere. I don't want to make that as a charge to go on the record because I am not sure that it could be substantiated. It is just rumor that I heard.

Mr. MEIGS: Could I make a remark?

Major RICHIE: Yes sir. What we want to get at is the facts.

Mr. MEIGS: There are a number of affidavits from the crew and pilot of the Steamer Harry Read. The Harry Read is a little bit of a boat. That might very easily go through a bridge like the Hannibal Bridge. But when it comes to a boat 300 feet long with a cabin 30 feet high, it would be an entirely different proposition. Now the Harry Read is a little boat, with no cabin on it, it is a little jerk water affair. The Harry Read going through there is a good deal like a skiff going through. Whereas you take a great big packet with the wind blowing hard, why it is like a frigate with the sails set. It is hard to control. It is an entirely different proposition.

289 So that the testimony of the officers of the Harry Read would not make the bridge safe, it is as easy to go through with it as with a skiff.

Mr. MAHAN: It is a fact that the Harry Read is a small boat. It is also a fact that no large boat but the Steamboat Clinton was ever injured at that bridge, and that boat only had part of her wheel house torn away. I don't suppose it cost five hundred dollars to fix her. But that is the only large boat that ever I knew of that was injured there. The Dictator was a small stern wheeler. The Flying Eagle was a little stern wheeler. Each wheel struck. I understand that the Little Eagle was a small boat.

Mr. MEIGS: A raft boat.

Mr. MAHAN: A raft boat and a stern wheeler. In fact, every one of these boats that were injured there were boats that were not apparently used to navigate the river especially at that point. Each delay, if I remember the statements, when the boats didn't usually go down was during very high water. I am surprised to hear that these boats didn't navigate that river at night. I have frequently seen boats myself going up and down through that bridge at night, that is, between nightfall and twelve o'clock. I have frequently gone through that bridge myself on large excursion steamers as late as twelve and one o'clock at night. I could not say how many times. We never regarded it as dangerous, but we had clear sailing. But when the Little Eagle, when the Flying Eagle went through it was regarded as foolhardy, as greatly dangerous for any one to go out on the river. Parents went down to the wharf and pulled their children off the boat and took them away. They didn't care whether they went or not, they didn't want to endanger their children's lives on that torrent. Probably the river never was as high as it was
290 during that period since the bridge was built.

Major RICHE: I will say one thing, and that is, the delay to boats, or even the damage to boats or to barges is a matter of minor importance in the consideration of this question in comparison with the possible loss of life. I think the statement of Captain Killeen here where he says that in the last twenty years there have been more lives lost at this bridge than from explosions and other accidents of like nature on the river, is one very well worth consideration. I would like to hear from the gentlemen on that point.

Mr. MAHAN: I am not sure now how many lives were lost, but I know that a number of lives have been lost there. I understood there was probably seven at the sinking of the Dictator, and I think there was three at the sinking of the Flying Eagle.

Mr. MEIGS: It was a miracle the whole crew wasn't drowned.

Major RICHE: That happened to the boat in high water, during high water, coming down suddenly approaching the bridge.

Mr. MAHAN: Many times, there is no doubt but what there is a heavy current there. It is a narrow place. It is a very deep place, as you can see by the statements of the bridge attaches there. They state that on each side of the draw pier it has now over forty feet of water. There is a current there; there is a swift current there and would be without a bridge. Of course, I should say that any bridge built on piers is more or less a menace to navigation. Any rock piers in a river interferes, to some extent with navigation.

Major RICHE: Unquestionably, but still bridges have
291 reason to exist.

Mr. MAHAN: They have to exist, that is true.

Major RICHE: And the question is to make them as safe as possible.

Mr. MEIGS: Would it be pertinent for me to give an experience of my own in going through that bridge with a tow?

Major RICHE: Certainly.

Mr. MAHAN: We would like to know the name of the gentleman.

Major RICHE: This is Mr. Meigs.

Mr. MAHAN: All I want is to have the name in the record.

Major RICHE: Mr. Meigs is in charge of that section of the river in which the Hannibal bridge is located.

Mr. MEIGS: I am Assistant United States Engineer and have been for the last twenty-five years, designing and building boats and have charge of the dry dock and canal at Keokuk, and while not having taken out a license as a pilot I can call myself pretty skillful in the handling of a steamboat. On one occasion there was six barges built at Rock Island for use on the Illinois river and I was instructed to take a tow boat and deliver these at Grafton. I took the little tow boat Lucia, 75 feet long, up to Rock Island and made the trip. The water was at a high stage and the pilot and I started at Rock Island and discussed all the way down how we would get that tow through the Hannibal bridge. That is, we began to run the Hannibal bridge when we left Rock Island.

Mr. MAHAN: I am afraid you were scared.

Mr. MEIGS: There was no difficulty whatever in running the Keithsburg bridge, the Burlington bridge, the Fort Madison bridge, the Keokuk bridge or the Quincy bridge. These bridges the
292 boat handled easily without breaking up the tow. As we approach the Hannibal bridge and found that the stage was twelve feet we concluded that we would tie up the tow and go down with the empty boat and take a look at the bridge and run her slowly through the draw so as to see what the draft of water was. In addition I consulted Captain Brown of Quincy how he made the run of the Hannibal bridge. He said "You go down to the shore at the bluff above the bridge, then you run out from the shore towards the upper end of the long pier and keep pushing for that pier," and he said "You watch narrowly the opening of the bridge and if it widens on both sides equally, you are all right." But if it widens on one side and not the other, look out. You can see when you are going straight towards the pier that pier appears fast toward the horizon, you can see you are making a straight line for it, whereas the other one is always moving. When you get down to the bridge, as you go down, you watch both sides and if they both appear to widen out this way alike, it is all right, but if this widens out this way, if one widens out this way and the other don't, you look out." We examined the bridge with the empty boat and we found so little current there that the pilot said "Why, Mr. Meigs, we can take the whole tow through." And we were surprised that it seemed to show so little cross current. So we went back and picked up the

tow. But I took the precaution to have the ax laid handy to cut the steamboat loose in case we hit. And we started out for the pier. This little boat the Lucia made rather slow headway through the water. And we approached the long pier quartering out from the shore. The tow seemed to go very nicely down towards the bridge, but just as we got perhaps by the head of the long pier, the
 293 cross current began to draw and the whole tow began to flank off to the right and bear down on that little pier which has done all the damage.

We set the rudder so as to push the boat diagonally, right diagonally across the draw and gave her all the steam there was, and when we were going past that little pier I don't think that the barge missed the pier by six inches. She was going diagonally right like that just as hard as she could go, and we were just going down by this little pier that way and we just barely missed that pier. She got through all right. Now every boat with a tow that goes through there has that sort of an experience. Those who go through there every day learn to study these cross currents and look out for them and they watch every time to take advantage of the best time to go through and they take their time to it as the water rises or falls. And the man in constant practise can allow for the difference of current. But the man who goes through only occasionally has no means of studying these minutiae, and it is most dangerous, perhaps, at high water. At low water, it is a mere pond there it is so dead that there is no current there and it is perfectly safe.

Mr. MAHAN: Which way does this cross-current run?

Mr. MEIGS: It runs from the head of the long pier. You don't feel it until you get right down towards the bridge. It runs from the head of the long pier towards the right, right straight from the head of the long pier to the right hand pier and on over. So that when you get in there your boat begins to flank off sideways over
 294 to that little pier. All you can do is to crowd her and push as hard as you can. If your boat is going very slowly, you have very little chance to get out of it. A big packet or a tow boat that is going rapidly through the water can change her position in an instant. But you get a tow boat with a heavy tow and it gets up in there, and she would be a long time there, the boiling water gets into her rudders, and she will aim to go this way or that way, or she may be standing still in the draw. If she flanks off to the left the whole thing goes under that shore span. When a man goes up to this draw and sees that he can't get through against that current, he stands still a long time, and the boat flanks to the left, the only thing he can do is to pull straight back and try it over again. They sometimes make three or four different attempts to go through. They come up to this draw and if they don't get it just right, they go back again. Then they try it again until they get it balanced and then they will go out slowly with the tow. They are a long time in danger. You take a powerful boat that has got lots of rudder power, she can stay here a little while. But you go down with a tow, with a little boat she is swung just this way and that you have no use or hold of the rudder. It is a very dangerous thing. If

there was anything to lean against on the right hand side, if a boom was there, or if it was possible to maintain a good sheer boom nobody would complain at all. But this cannot be. You cannot maintain a boom there.

Mr. MAHAN: What do you think causes that cross-current there?

Mr. MEIGS: Well it is due to the base of the piers at high water. Both pier-rests down there, and the draw pier rest itself are virtually admitted by all not located for high water. The current
295 don't run parallel in high water to the draw rest. When they located that thing it paralleled at low water, but in high water it is different.

Mr. MAHAN: Suppose that rest pier was simply dropped down closer if such a thing could be done, to the pivot piers would that do away with the cross currents?

Mr. MEIGS: It would be much more dangerous. They would what we call "saddle bag the pier" and that is the worst possible condition. That is what the Flying Eagle did. She came up there and staggered and he attempted to back down and the boat went over sideways and saddle bagged and everything upset.

Mr. MAHAN: Let me call your attention to the fact that the Flying Eagle wasn't wrecked on that side.

Mr. MEIGS: It doesn't matter on which side. If you have ever been in a boat and seen its condition of the river. Apparently the current, is in a very unstable condition at its surface, it is not like this floor, smooth water, the boat will turn this way and that way. It will do that right in the draw opening to owing — the fact that there has been so much rip-rap put in around these piers. It is a regular torrent there. I guess there is a current of seven miles an hour right there at the bridge that a boat has to labor against giving through, or at least has to contend with under the conditions that I have named. That is why the boats are swung onto the draw piers and endangered.

Mr. MAHAN: I want to call your attention to the fact that these soundings made by an employee of the bridge company show that as a matter of fact the pivot pier is about in the center of the channel. And the further fact that it grows very much shallower
296 towards the Missouri shore. Now there is only 18 feet of water between this span now next to the Missouri shore. I should have said point. I don't know how shallow it would be in low water. But it would be a very difficult thing to dredge out that as I understand it is rock bottom, a rocky cliff there all along. And I think in low water there would not be any channel there.

Major RICHE: We have cross-sections at the bridge. Are you familiar with them, Mr. Meigs?

Mr. MEIGS: Yes sir, I made one not long ago.

Major RICHE: You can see if that is correct. That is the one that the railroad company made. You may examine that and see if that corresponds with your knowledge on the subject, your impression of the matter as you remember it.

Mr. MEIGS: It is not the same scale as mine. Mine is much deeper vertically.

Major RICHE: This is probably a natural scale is it not?

Mr. MEIGS: I guess that is on the natural scale.

Mr. MAHAN: It was twelve feet above low water at the time that was drawn.

Mr. MEIGS: That shows a shallow stage with no water along the shore. That would have to be excavated.

Major RICHE: Do you know what that material is there?

Mr. MEIGS: No sir.

Mr. MAHAN: I am sure that is rock.

Mr. MEIGS: It is probably rock.

Mr. CUNNINGHAM: You would have to change the east channel.

Mr. MEIGS: The center of the draw is undoubtedly located in the deepest water.

297 Mr. MAHAN: In other words we think that if we move that pivot pier there where you propose to move it there would be only one side that you could go through on, that would be the east side of the pier. As to this stoppage, we haven't anything to show the depths above there, above the bridge.

Mr. MEIGS: That is right under the center of the bridge there has been more or less filling up with rock, around here, above this point here.

Mr. MAHAN: We don't think that has been filled up there at all with rock.

Mr. MEIGS: This part has. There is lots of filling around these piers.

Mr. MAHAN: In the channel piers, they have filled down to them. I never had it sounded. But I will do that and take pleasure in giving it to you. There has always been an idea that it would be impossible to put a sheer-boom such as is maintained at other bridges above this pier on account of the depth of the water.

Mr. MEIGS: That is the idea. There has always been an idea that it would be impossible to put a sheer-boom such as is maintained at other bridges above this pier on account of the depth of the water. Well now, it looks like it was very shallow, if this shows the approximate depth of water above the bridge, there is no reason why they should not do it, should not build a sheer boom there as well as anywhere else.

Major RICHE: Haven't you a record of the soundings?

Mr. MEIGS: Yes sir, we have maps showing soundings there.

Mr. MAHAN: We have here the information. I think I can file this afternoon a statement or affidavit by Mr. Cunningham in connection with the affidavits spoken of heretofore. I can do that

298 this afternoon so that you will have that matter before you.

I will file this affidavit or statement in regard to the depth under the span, that shore span.

Major RICHE: Now the trouble with the bridge appears to be entirely in high water when you have plenty of water in that opening. In low water there is no trouble. If the pivot pier were placed here why couldn't they run this deep channel in the low water when there is no trouble and then use this one in the high

water when there was plenty of water in there, only use in there a sheer boom.

Mr. MAHAN: That is the only point Major Riche: Mr. Meigs is going to look what the soundings show above this pier to see if there is any water as would permit a sheer boom where this is done.

Mr. CUNNINGHAM: There is riprapping shown there and the depth of the rip-rap.

Major RICHE: Regarding the loss of life, I have an informal statement here that on the Dictator there were eleven lives lost, on the Friendship fifteen, on the Little Eagle eight and on the Flying Eagle two, making a total of thirty-six lives.

Mr. MAHAN: I know that is wrong because I know the Flying Eagle positively lost three and the others I don't know.

Major RICHE: That would be more really than this shows.

Mr. MAHAN: I don't know of any reason why, but it is probable that they kept a record at the bridge. I don't know that they did.

Major RICHE: That is the record that you hope to get.

Mr. MAHAN: Yes sir.

299 Major RICHE: Would that show the loss of life?

Mr. MAHAN: I am not sure, but I am sure it will show the disasters, to boats the names of the boats, the dates of the disasters and the amount of damage, and probably the loss of life?

Major RICHE: There is another pertinent — in this connection. Why don't they have some accidents at some of these other bridges. I never heard of any except in connection with this bridge.

Mr. MAHAN: I don't know whether they have had any accidents at other bridges or not.

Major RICHE: After this meeting is over and the examination of witnesses is completed, and all the papers filed on both sides which it is desired to be filed. I propose to turn the papers over to some one to make an argument from the side of the navigation interest. I expect to submit to them and give them, of course access to all the papers filed by both sides and give them any information they may want. When that is done then I will make up the statement and turn it over to the representative of the bridge people to reply to. Are you authorized to make reply for the bridge people.

Mr. MAHAN: Yes sir.

Major RICHE: If I submit that to you it will be sufficient.

Mr. MAHAN: Send it to me and I will make the reply or some other representative of the Bridge Company.

Major RICHE: But communicating with you will be sufficient?

Mr. MAHAN: Yes sir. I desire to say further that this afternoon I will file the affidavit of Mr. Cunningham and probably the other gentlemen in regard to these two maps. Then I should say within two weeks I can get Captain Cothell's and Mr. Parkhurst's statements: may be, sooner than that.

300 Major RICHE: As soon as you can get them and put them in, then I would like to submit them to the representative of this navigation interest and get an argument from them of their side of the question; then when that is done I will turn it over to you.

Mr. MEIGS: This shows the low water line running right close to the shore.

Major RICHE: When was this made?

Mr. MEIGS: In 1897.

Major RICHE: I suppose the conditions haven't changed?

Mr. MEIGS: They haven't changed there at all.

Major RICHE: That is up stream?

Mr. MEIGS: Yes sir. Now you know the objection to a guide fence or a guide boom to this pier, the reason they haven't constructed one is because the water is very deep there, or is so deep there and so swift that it is impracticable they say to build it. It is marked at the stage 4 1/2. If you look up here you will see above the pier, 26 feet, 16 feet, 23 feet. It is generally deep all the way as you see. You take 16 feet or say you have a 26 foot stage, 26 feet deep right above that pier; at a four foot stage, add 16 feet which is the distance to high water, and 15 to 26 and you have 42 feet. A boom floating in water 42 feet deep with anchoring chains that long, very often and with an accumulation of drift coming down, the drift catch on the chains and it is going to sink. That is why they have never talked about putting this in. That would be a very simple remedy to put a fence up here. But they have always thought it could not be maintained. Note this map shows 15 feet, and

18 feet just above and below this bridge. There is manifestly
301 some shoaling under the bridge.

Mr. MAHAN: There is 12 feet here.

Mr. MEIGS: There is four and a half feet at low water at this point.

Mr. MAHAN: There is 18 feet here, so that it looks as if it was dug out there.

Mr. MEIGS: There generally is a scoop near a bridge.

Mr. MAHAN: This one is 27 feet right close to the bridge there. You see that 28 goes all along, the 27 feet and 28 feet goes all along.

Mr. MEIGS: That is the low water line, the line of low water, shallow water, at low water; that is very near the end of the span. That is the line of four and a half feet at low water.

Mr. MAHAN: That is where the end of the span is there. That is simply that a third of the span would be dry, just below this down there.

Mr. MEIGS: There is too much water already right there.

Mr. MAHAN: There is the dry line there. That is about a third of the distance. You divide that up into three parts and you have got about a third.

Major RICHE: The point is at low water they would not run that side, they could run through the other side here.

Mr. CUNNINGHAM: That is evidently the channel right straight through there.

Major RICHE: This shows very deep here all along the bridge where the profile does not.

Mr. CUNNINGHAM: It is, 9, 8, 6, 5, 6, 6, 6, 14, 20, 24.

Major RICHE: Towards the Illinois shore it shows very shallow.

Mr. CUNNINGHAM: It is only 6 feet.

302 Major RICHE: About the same. 1, 2, 3, 4. Then over here it shows about the same as that. That would be showing

high and dry about a third of the distance up, would you say? These were taken lately?

Mr. CUNNINGHAM: Yes sir. This shows rip-rap around there and gives you the distance from the water at a shallow stage to the rip-rap. The rip-rap cannot interfere with navigation at all. It is 15 feet to this stage; the shallow stage is about five feet.

Mr. MAHAN: Would there be any objection to our having a copy of this letter of Major Lusk to Gen. McKenzie of date February 1st 1905, and also the names of the witnesses who have made replies.

Major RICHE: These statements made by the river men and the first paper read, being the petition and endorsements?

Mr. MAHAN: Yes sir.

Major RICHE: No sir, no objection in the world. When do you want these?

Mr. MAHAN: Within eight or ten days.

Major RICHE: Would you want them before you submit your statement in reply?

Mr. MAHAN: Well, oh, no, not before I submit our affidavits. I will just submit our affidavits as to the general facts and in answer to anything we deem important in the facts so far developed. And I would like to have the names of the witnesses, the pilots and captains and also the answers of eight or ten of them so that I can get a general idea of what they state.

Major RICHE: Yes sir, you can have them; there would be
303 no objection to that. I want to know whether it would be most convenient for you to take such notes as you want right here or get them hereafter.

Mr. MAHAN: I thought I could get your gentleman here to send me copies and I would pay for them.

Mr. MEIGS: This profile shows the condition 180 feet below the axis of the bridge and this one 180 feet above the axis of the bridge. This other one is in the axis of the bridge. That shows, you see that it is for only a short distance, if there is any excavation required.

Major RICHE: They would only use that side during high water?

Mr. MEIGS: Yes sir.

Major RICHE: Probably this rest pier would come out?

A. Yes sir, they need not excavate it at all. There would be near 160 feet in there during high water, there would be plenty of water, there is 250 feet of a span there now and they would only use a portion of that opening; they would only use 125 feet of it, so that there would be no excavation required.

Major RICHE: In the shallow water where it could be maintained, wouldn't you have some trouble, exactly the same as when you get a sand bar there. Wouldn't you have exactly the same situation that you had up at this point here?

Mr. MEIGS: It would hold him up against the fence.

Major RICHE: This situation would be all right if you could maintain a fence above from that pier.

Mr. MEIGS: If you would put in a boom like we have at Keokuk which is 16 feet wide, and solid, and run that from this pier up to

the shore and connect it there, one could take any steam-boat—

304 Mr. MAHAN: What do you mean?

Mr. MEIGS: I mean from the first pier west of the pivot pier, then from that above up to the shore, making that practically by means of a fence the same as a shore, just making this continuous with the shore, running it up this way diagonally; it would make it absolutely safe. Because a boat that flanked over would go against this boom, would not hurt herself, she would simply have to go back and try it again. Now if she gets there and flanks this way, the first thing she does she gets against this pier and when she draws back she tears out one side of her hull. It is the danger of going this way where there is no opening.

Mr. MAHAN: How long would that have to be do you think.

Mr. MEIGS: You can't say. This pier is so far out in the river that to give it a good slope, say it had a slope like that from there to there. This is about 400 feet to the inch. That would be 1000 feet.

Major RICHE: One thing. Don't you think, a pier of that kind if it was built solid would make further complications with the currents?

Mr. MEIGS: I consider that a floating boom, if there were piers put in at intervals, we will say of 100 feet or 200 feet, so that the boom would have something solid to rest against would be all right. The boat would go down against it and the current would glue her to it. The only thing you would have to do would be to paddle along to keep the boat on its way with the tow. When it is moving very slowly and it gets up here by the bridge and it begins to stagger, the rudders are in that boiling water, and she begins to go over this way. If the tow has not speed, going fast enough to clear the stern, the tow is gone, because the moment the stern strikes there the piers of the bridge interfere. Now if he goes the other way he is liable to saddle bag on that long pier and break in two and capsize the boat. Giving speed to his boat, his extra power in running this draw is desired so as to limit the time of danger. When we went down with that tow, we ran the bridge all the way down from Rock Island. All the way down from Rock Island we discussed how we would do it. First we thought we would tie the barges up here and take some of them, and let them come down this shore because the current is so swift we were afraid to go down that way. It sometimes happens that a boat has not speed enough to get away from the bridge. The water was a twelve foot stage. It was very much quicker than we were. The pilot says "We can take the whole thing through there." So we came around and we ran into this place. When we got down there we headed for that pier. It all went very nicely but as we were going down there suddenly she began to sag off sidewise gliding off against this pier. Then we turned around and pushed this way as hard as we could; with a little boat and a lot of barges like it that goes through the water very slowly. We kept watching that pier. And it was touch and go. We just missed that pier about that much. We got through all right but we were in

great danger of losing the barges or losing one of the barges. It would have knocked the side out of one barge if one had hit but I had taken the precaution to cut the barge off, if necessary. If you
306 go on a steamboat, one of the large packets one that carries an old pilot and you come down to the Hannibal bridge, day or night either, if you look at him, his knees are knocking together like this and his hands are trembling until he gets through. Then he feels relieved. That is the worst job he has got on the river. It is not right that the bridge should be maintained so that there is danger. These pilots are very skillful, a very skillful lot of men. They take these boats through in a very skillful way. You take these boats that are all boxed in, all cabins the cabins all built around like a box. A young pilot will go through a bridge like that and he won't think anything of it. But you take an old pilot at the same bridge and his knees are knocking together.

Major RICHEY: Mr. Meigs as soon as Mr. Mahan — given us the information he contemplates giving us I want to refer this whole case to some representative of the navigation interests, to somebody representing that side to present an argument. After that is in then I want to hear from Mr. Mahan again at the close.

Mr. MEIGS: I think that the record of the bridge would be very valuable, and would be advisable to have, if they kept the records with regard to the boats hit on the bridge, the dates and the facts.

Mr. MAHAN: I think they kept them but I am not sure. I went up to the bridge to get them myself. They said that whatever records they have were sent to Springfield.

Mr. MEIGS: It might be that they would want those facts expunged from the record.

Mr. MAHAN: I think not. The engineer would, I should think. He might have and he might not have put it down there. He
307 probably would put it down though because he never thought it was his fault. He always figured that it was the fault of the men operating the boats, every time. If you heard him talk you would think it was no one but the pilots of the boats.

Mr. MEIGS: I don't think a man on a bridge is always in position to know as to the workings of a boat under such conditions. You go through on a steamboat and know that your life is in a certain amount of danger. You take it at the Quincy bridge. I came down sometime ago. We had a dredge and we hired a tow boat from Quincy to come up and catch hold of it and take us through. We had one of our little boats but she could not handle it. Just as we got down above this bridge with this boat towing the dredge, with the draw already open and we were about to go into it, the infernal fool on the bridge closed the bridge on us and we had to stop the boat and back up, after we had just reached the bridge and were ready to go into the draw. I just felt like shooting the fellow on that bridge. He was risking my life and he was risking \$35,000 to \$40,000 worth of dredging machinery. When he sees a steamboat coming, he thinks, it is easy enough to stop so he lets them wait awhile. But if a stick gets in your rudder or if your machinery gets to acting badly and you are approaching a bridge, you are in danger, a danger

which the man on the bridge knows nothing about. Below the bridge there is no danger, if anything happens you drift away from it. Above the bridge if anything happens you drift on to it. Nothing can help you. It is that which makes a bridge dangerous. It is not only above it but clear through. That is the trouble with the Hannibal bridge. It has not this funnel shape approach which they have gotten in almost every other bridge. The Fort Madison bridge is just about——

Mr. MAHAN: You don't think that it would be necessary to change the pivot pier and the span of it practically shored in from the first pier west of the pivot pier connected with the shore above?

Mr. MEIGS: I don't think it is practicable to maintain that boom. I think the anchorage chains are too long. There is too much drift coming down in high water, the boom would not stay, it would get wrecked.

Mr. MAHAN: If it was practicable to maintain a boom like that, would you say that would be sufficient and safe?

Mr. MEIGS: Yes sir. I would say that that would be a cheaper solution of the problem but not so good as going down the shore. I would rather go down the shore where I am safe. You see there has been a difference in the method of towing in later years. In former times we used to put the raft through the raftspan, that is, they took a raft 240 feet wide, and they put it through the raft span, then the steamboat backed up and went through the draw. Of later years they cut these rafts in two, they keep them always 125 feet wide and shove them through the draw span, so that the steamboat don't have to let go of the raft at all. The same thing with a tow. They don't aim to drop the boat back over to the draw and go through, but keep hold of the tow all the time, which is much better.

309 The Cover of Document 5 is endorsed as follows:

Report of Public Hearing in the Hannibal Bridge case Held at Rock Island, Ill., June 6, 1905.

Office Chief of Engineers, War Department.
Jan. 15, 1905.

47489 35.

Office of the Secretary, War Department.
Mar. 3, 1906.

8247 11.

310 United States Exhibit No. 4A is in the words and figures following, to-wit:

U. S. ENGINEER OFFICE,
ROCK ISLAND, ILL., March 25, 1905.

Captain W. R. Tibbals, Diamond Jo Line, Dubuque, Iowa.

DEAR SIR: There have been referred to this office for action, several petitions, addressed to the Secretary of War and signed by

vessel-owners, masters, pilots, and others interested in the navigation of the Upper Mississippi River. These petitions set forth that the bridge over the Mississippi River at Hannibal, Missouri, in its present condition, is an unreasonable obstruction to the free navigation of the said river, by reason of the location of the existing draw-openings, the absence of guard-fences or sheer-booms, and the presence of artificial deposits of stone about the piers. The petitions request the Secretary of War, under the authority vested in him by law, and after a due hearing of all interested persons or corporations, to require such alterations to be made in and about the said bridge as will render navigation through it reasonably free, easy and unobstructed.

From the records of former hearings and inquiries in regard to this bridge, it appears to be the prevailing opinion of navigators that the following changes in the Hannibal bridge are necessary to afford suitable relief to navigation:

311 "The west draw-pier (first pier from Missouri shore), to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot-pier; and proper guard fences to be built along the Missouri shore above and below the new shore-pier.

"Each of the draw-openings on the new location of draw span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

"The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers."

Such changes in the Hannibal bridge as those described above are important, and to secure their Congressional action may be required. It is therefore necessary that the presentation of the matter be made full and complete. To secure the needful information on this point I would ask for replies to the following questions, and also for such additional remarks as you may be willing to make.

JAS. L. LUSK,

Major, Corps of Engineers.

312 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes, tow boats and passenger boats of all descriptions except rafts.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes, a very great obstruction. The location of the bridge in a very narrow point in the river causing very much increase in the current at that point.

3. What do you consider the best plan for making the passage of

the Hannibal Bridge more safe and convenient for all classes of navigation?

By moving the draw one-half span west, then by placing a sheer-boom above and below the shore pier.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes, very much.

5. Do you consider the Hannibal Bridge the most dangerous of the Upper Mississippi River bridges?

Yes, by a great deal.

313 6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal Bridge? These facts are desired in order that the amount of loss may be approximately estimated.

The total loss of several steamers and many lives. The steamers that I can call to mind are the Dictator, Friendship, Little Eagle, Flying Eagle, and from five to twenty lives lost from the different named steamers. Much damage has been done to other boats and rafts, which I cannot just name.

7. Can you give other facts having a bearing on the question?

I am of the opinion that the danger at this bridge will be very much increased by the leveeing of the west bank of the river, which will cause very much increase in the current in high water, thereby increasing the danger going both ways up and down through this bridge.

W. R. TIBBALS,
Master and Pilot.

(Endorsements on Back:)

File Box No. 17.

1378/9.

U. S. Eng. Office. Rec'd Apr. 1, 1905, Rock Island, Ill.
Capt. W. R. Tibbals, Diamond Jo Line Steamers, Dubuque, Iowa.

314 SIR: 1. Do your duties now, or have they in former years, required — to run boats, or tows, or rafts through the Hannibal Bridge, and are you familiar with the difficulties of navigation at that point?

Some seasons I've used this bridge daily. Am familiar with its disadvantages.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

I do. In high water a very dangerous side draft. No guards or side fences.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

I approve of the changes set forth in this petition.

4. Are you in favor of moving the draw to the west so as to bring one opening to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

I am and think it the proper change to make.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi Bridges?

I certainly do.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

During my experience on the Miss. River for the last 30 years I know there have been many serious accidents to steamboats and considerable loss of life. I've always found some difficulty in passing through this bridge with a tow.

7. Can you give other facts bearing on the question?

In 1876 the steamer Dexter struck said bridge with tow was turned over with some loss of life &c. Little Eagle was damaged. Flying Eagle sunk, and others that I cannot call to memory as I kept no records.

CAPT. A. J. WHITNEY.

(Endorsements on back:)

File Box No. 17.

37. 1378/1.

U. S. Eng. Office.
Rec'd Mar. 30, 1905.
Rock Island, Ill.

A. J. Whitney.
Rock Island, Ill.

316 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes; I am.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes! I always considered the bridge as dangerous, especially so in high water on account of the strong cross currents both above and below the bridge.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

(No answer given to this question.)

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building

of guard fences or booms along that shore above, and if necessary below the shore draw opening?

I am!

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

I do.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

The Str. "Little Eagle" was sunk there and cannot remember the exact number of rafts being broken up there, and the number of boats being carried against the piers and damaged, the incidents are too numerous to remember.

7. Can you give any other facts having a bearing on the question?

(No answer given to this question.)

Master.

W. H. WHISLER, "*Master*,"

H. C. SHORT, "*Pilot*,"

Str. Rutledge.

(Endorsements on back as follows:)

File Box No. 17.

38. 1378/2.

U. S. Eng. Office.

Rec'd Mar. 31, 1905.

Rock Island, Ill.

Capt. W. H. Whisler (Master).

Rock Island, Ill.

H. C. Short (Pilot).

Rock Island, Ill.

Steamer Rutledge.

318 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

They do. I am.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

I do so consider it. Because of the location of the Draw Span, and the swift and cross current at head of Draw Pier.

3. What do you consider the best plan for making the passage of the Hannibal bridge more safe and convenient for all classes of navigation?

Move draw span to Missouri shore. Guide fence above and below

bridge. with not less than six feet of water the entire length of guide fence.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

I am.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

I do.

5. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

St'r Dictator total loss.

St'r Little Eagle total loss.

St'r Flying Eagle and Excursion barge total loss. Exact dates not known.

7. Can you give other facts having a bearing on the question?

Hannibal bridge being located just below a sharp bend in the River, with an up stream wind the Bridge Tender can not hear the boats whistle, in that case the boat must back up and wait thereby losing headway and steerage. With the desired change in the Draw a Pilot can back in along the Guide fence and when the Draw is open the boat may slide through without danger.

CAPT. PERRY M. RUBY.

(Following endorsements on back:)

File Box No. 17.

39. 1378/3.

U. S. Eng. Office.

Rec'd Mar. 31, 1905.

Rock Island, Ill.

Capt. Perry M. Ruby,
Davenport, Ia.

320 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes sir.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes sir. The position of the draw, and the swiftness of the current in extreme high water.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

Construct the draw so as to rest the west end on the west shore pier and have shore protection.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes sir.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes, sir, in high water.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

I know of three boats being wrecked in which several lives were lost, also a number of rafts.

7. Can you give other facts having a bearing on the question?

The Hannibal bridge has been a menace to navigation ever since it was constructed.

River men have complained, and have made several attempts to have this dangerous bridge either constructed more safely or removed.

JOHN O'CONNOR.

(Indorsements on back.)

File Box No. 17.

40. 1378/6.

U. S. Eng. Office.
Rec'd Mar. 31, 1905.
Rock Island, Ill.

Capt. J. O'Conner,
Rock Island, Ill.

322 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

We have navigated the River near and about Hannibal, Mo.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes we consider the Hannibal Bridge an unreasonable obstruction. During high water it's very dangerous as the current is very swift & the Pivot Peir divides the water so to either side so much so unless the boat is very powerful it will sheer sideways.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

By moving the Draw west one span & having a good sheer boom to be created above and below the longer part above the bridge so as to slide above it during all stops of boats.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

I am in favor of moving the Draw west & make Shere Booms above and below along the shore.

5. Do you consider the Hannibal Bridge the most dangerous of the Upper Mississippi River bridges?

Yes I consider the Hannibal Bridge the worst on the upper River.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

In the year 1903 we lay 10 days with a towe waiting for the water to fall enough so as to make it safe to go through so as not to be shoved to one side against the *peirs* the divide from the Pivot *Peir* is so great during high water that it will shove a towe either east or west depending which side you take. I sever- times come very near hit-ting the Rest *Peirs* during high water.

7. Can you give other facts having a bearing on the question?

I can not say that the Bridge is particular- dangerous only during high water. During low water the cur-ent is not swift & has no tendency to sheer you to either side yet if it was windy it would be the better for a Sheer Boom to run alone either going up or down there ought something to be done so as to make the Bridge more safe at all times of high or low water wind or no wind as the Hannibal Bridge is an obstruction to navigation.

Truly,

JACOB RICHTMAN,

Master and Pilot Mo. & Miss. Rivers.

324

(Endorsements on back as follows:)

File Box No. 17.

41. 1378/8.

U. S. Eng. Office.

Rec'd Apr. 1, 1905.

Rock Island, Ill.

Capt. Jacob Richtman,

Nauvoo, Ill.

SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes, firstly, on account of the bridge being built in such a narrow place in the river, and secondly, on account of the west draw pier

being so far from shore and having no sheer-boom to guide the boats through it.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

Move the draw span one-half ($\frac{1}{2}$) its width west, then place a sheer-boom above the shore pier as at Savannah, La Crosse, Louisiana and other well-regulated bridges.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes, very much.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

326 Yes, one hundredfold.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

The loss of the steamers Dictator, Friendship, Little Eagle, and Flying Eagle, with from two to fifteen lives lost on each of the different boats as well as each boat being a total loss. The Diamond Jo Line steamers never run this bridge at night during high water down stream; lay by eight or ten hours at a loss of \$20.00 an hour.

7. Can you give other facts having a bearing on the question?

Nothing more than above.

JOHN KILLEEN, *Supt.*

(Indorsements on back as follows:)

File Box No. 17.

42. 1378, 10.

U. S. Eng. Office.
Rec'd Apr. 1, 1905.
Rock Island, Ill.

Capt. John Killeen,
Capt. Diamond Jo Line Strs.,
Dubuque, Ia.

SIR: 1. Do your duties now, or have they in former years, 327 required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

They have in former years. Am familiar with bridge.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

I do because the draw is out near the middle of the river so we have nothing to run by; the current is very swift there, more so than any bridge on the river.

3. What do you consider the best plan for making the passage of the Hannibal bridge more safe and convenient for all classes of navigation?

Put the draw next to the Missouri side.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

I am.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Without any doubt.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

There has been many accidents at that bridge to my knowledge.

The Dictator sunk there, also the Little Eagle and others that I can not recall just now.

7. Can you give further facts having a bearing on the question?

I came up there with a tow of six barges with the Robt. Dodds; the water was so high I had to put them through the span next to the Illinois shore one at a time on account of the danger connected with going through the draw.

R. H. TROMLEY.

(Following endorsements on back:)

File Box No. 17.

44. 1378/12.

U. S. Eng. Office.
Rec'd Apr. 1, 1905.
Rock Island, Ill.

Capt. R. H. Tromley,
Dubuque, Ia.

SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes. Ever since its construction.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Emphatically, yes. Because of its acting as a partial dam in high stages. It creates a fall and an extreme velocity of current, making navigation at the passing extremely hazardous. This hazard is increased by lack of any protection works either at draw-rest or piers.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

To build the draw-rest of timber or masonry or both, solid* from the bottom of the river up to above highest water-mark. Extend same construction 1,000 ft. up the river parallel with the flow of the current and 200 ft. down river. This will give passing boats a choice of sides in windy weather, allowing them to "flank" to it in passing down and to "warp" in passing up.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes,—if the foregoing plan is not deemed admissible.

(See letter attached.)

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes. Without a doubt.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

Steamer Friendship, total loss.

" Dictator, total loss and five lives.

" Little Eagle No. 2, total loss.

" Flying Eagle, total loss and three lives.

and many other cases of damage to steamers, barges and rafts.

7. Can you give other facts having a bearing on the question?

I have noticed that in high water there is an intermittent action of the current in the draw openings between the piers and the pivot pier. This produces "swirls" or "boils," a sort of ebb and flow with a cross action of the current which is baffling to the steerage way and will throw the boat to one side or the other with force. This condition can only be remedied by a solid* construction of the draw-rest from the bottom, thereby making a straight water-way for the flow in the congested part.

Hoping your action may result in relieving us from this terror, I am

Very respectfully,

Your obedient Servant,

H. S. BROWN,

Master & Owner.

* Word "solid" to be construed not necessarily transversely, but longitudinally.

(Following endorsements on back:)

File Box No. 17.

45. 1378 13.

U. S. Eng. Office.
Rec'd Apr. 1, 1905.
Rock Island, Ill.

Capt. H. S. Brown,
Quincy, Ill.

332 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point.

Yes.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes. On account of the cross current and no sheer booms.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

Answer as in question 4.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

In 1903 Str. Flying Eagle was wrecked.

In 1903 Str. Jacob Richtman was delayed 10 days, on account of not being able to pass with a tow of 2 barges.

7. Can you give other facts bearing on the question?

No.

JAS. J. RICHTMAN.

(Endorsements on back as follows:)

File Box No. 17

46. 1378/14.

U. S. Eng. Office.

Rec'd Apr. 1, 1905.

Rock Island, Ill.

Capt. J. J. Richtman,

Nauvoo, Ill.

334 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point.

Yes.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes. First, on account of the bridge being built in such a narrow place in the river. Second, on account of the west draw pier being

so far from shore and having no sheer-boom to guide boats through same.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

Move the draw span one-half of its width west and place a sheer-boom above the shore pier, as at Savannah, La Crosse, Louisiana and other bridges along the river.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes, very much.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

335 Yes, vastly more dangerous than any other bridge.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

The total loss of the Strs. Dictator, Friendship, Little Eagle and Flying Eagle, with loss of several lives in each wreck. Diamond Jo boats never run this bridge at night during high water on down stream trip, but lay by 8 to 10 hours, which means a loss of \$20.00 an hour.

7. Can you give other facts having a bearing on the question?

The above facts cover the case pretty thoroughly.

Yours respectfully

HARRY CLARK.

(Following endorsements on back:)

File Box No. 17.

47. 1378/15.

U. S. Eng. Office.
Rec'd Apr. 3, 1905.
Rock Island, Ill.

Harry Clark,
Gen'l Agt. Diamond Jo Line Strs.,
St. Paul, Minn

336 STR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes in former years.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

I do.

1st. Draw Span too narrow, 2nd Piers not parallel with current causing cross currents and eddies in water.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

The removal and widening of space between the Piers will in my judgment remedy most of the danger to passing through Draw.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

One of them.

337 6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

I have no personal knowledge of them.

7. Can you give other facts having a bearing on the question?

Nothing more that I recall.

Yours truly,

LON BRYSON.

(Indorsements on back as follows:)

File Box No. —.

48. 1378/16.

U. S. Eng. Office.

Rec'd Apr. 10, 1905.

Rock Island, Ill.

Capt. Lon Bryson,

Davenport, Iowa.

338 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes, because the bridge is located at the narrowest place between Hannibal and Quincy and the current in high water is always very swift and the draw too far from shore.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

Move the West little pier on the shore, then place the draw pier where the little pier now stands, then build a fence 100 ft. below the shore pier and 250 ft. above this same pier.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes, it is the only way to make this bridge safe. Build a fence 100 ft. below the Missouri Shore pier and a fence 250 ft. above the same pier. Same as the bridge at Hastings, Minn.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

339 Yes. Tow Boats with Barges always lay up and never tries to go through this bridge, neither up or down stream, after night.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

The St'r Clinton struck the west little pier going down the river. She was damaged about Fifteen Thousand Dollars. The St'r Centennial struck the same pier and was damaged about Four Thousand Dollars.

The Steamers Little Eagle, Dictator, Friendship and Flying Eagle struck this bridge and were a total loss.

7. Can you give any other facts having a bearing on the question? No.

CAMPBELL HUNT,
Pilot U. S. Lily.

(Endorsements as follows on back:)

File Box No. 17.

49. 1378/17.

U. S. Eng. Office.
Rec'd Apr. 10, 1905.
Rock Island, Ill.

Capt. Campbell Hunt,
U. S. L. H. Steamer Lily,
St. Louis, Mo.

340 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

My duties requires me to run boats and tows through the Hannibal bridge.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Because it is difficult to hold a boat or tow steady during high water.

3. What do you consider the best plan for making the passage of

Hannibal bridge more safe and convenient for all classes of navigation?

A Bascule of lift draw bridge would be safe and convenient, there should be a clear width of 250 feet.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Move the draw near the Missouri shore and build guard fences or booms along that shore.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

The tow boat Dictator, the tow boat Eagle, the Excursion boat Flying Eagle *was* sunk on the Hannibal bridge. The Flying Eagle was a total loss.

7. Can you give other facts having a bearing on the question?

There should be some posts or ring bolts on the guard fences or booms.

It is difficult to see the red or green lights on the piers when it is fog or smoky weather.

S. I. DOLSON (*Pilot*).

(Endorsements on back as follows:)

File Box No. 17.

50. 1378/18.

U. S. Eng. Office.

Rec'd Apr. 10, 1905.

Rock Island, Ill.

S. I. Dolson (*Pilot*).

Dubuque, Iowa.

342 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes I have run a passenger, tow and raft boats through Hannibal Bridge.

2. Do you consider the Hannibal Bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes I consider the Hannibal bridge the most dangerous bridge between St. Louis, Mo., and St. Paul, Minn. It is simply a death trap to all steam vessels.

3. What do you consider the best plan for making the passage of

Hannibal bridge more safe and convenient for all classes of navigation?

I would recommend that the draw span be moved to the Mo. shore and a sheer boom be built above and below the bridge on the Mo. shore.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes.

343 6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

Str. Dictator Str. Little Eagle Str. Flying Eagle were total losses Str. Mascott sunk but saved afterward Str. Rob. Roy damaged Str. Susie Silver lost one wheel on bridge Str. Lumberman sunk barge on Bridge and many other small accidents to boats and rafts.

7. Can you give other facts having a bearing on the question?

Yes owing to the cross current at the Hannibal Bridge it makes the bridge most difficult for a Pilot to run it with loose raft or a tow of barges.

CAPT. JESSE D. MEFFORD,

Quincy, Ill.

(Indorsements as follows on back:)

File Box No. 17.

51. 1378/5.

U. S. Eng. Office.
Rec'd Mar. 31, 1905.
Rock Island, Ill.

Capt. Jesse D. Mefford,
Quincy, Ill.

344 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes on account of location of draw no sheer boom. Floats between Pivot Pier & draw rest are not of sufficient height and should be built solid from bed of river up.

3. What do you consider the best plan for making the passage of

Hannibal bridge more safe and convenient for all classes of navigation?

Move draw so west end will rest on Missouri shore build up from bed of river solid between Pivot pier and draw rest which will stop cross current in the draw.

4. Are you in favor of moving the draw to the west so as to being one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes.

345 6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

Str. Flying Eagle and Barge Little Gate wrecked June 3 1903
Loss \$14,000.00 4 Persons drowned damage to business personaly \$10,000.00.

7. Can you give other facts having a bearing on the question?
(No answer.)

JOHN F. ADAMS.

(Following endorsements on back:)

File Box No. 17.

52. 1378/19.

U. S. Eng. Office.
Rec'd Apr. 15, 1905.
Rock Island, Ill.

Capt. J. F. Adams,
Quincy, Ill.

346 SIR: 1. Do your duties now, or have they in former years required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point.

Yes.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes very dangerous especially in high water because the river is very narrow there the draw is very narrow & on account of the very swift and cross currents a boat can not be held steady & there is no protection or anything to land against.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

There should be a wider draw span. There should be a solid pier 300 or 400 feet above the draw span pier and a sheer boom from the

draw pier to the solid pier above so that boats could land at or slide alongside in case of wind or extreme high water.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes that is really the proper way.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes, decidedly.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

Boats lost there with loss of life str. Dictator str. Little Eagle str. Flying Eagle. Many times I have laid above the bridge in high water from 10 to 12 hours on account of wind while if there had been a sheer boom extending above the bridge like at Quincy or Louisiana bridges there would have been no delay whatever.

7. Can you give other facts having a bearing on the question?

The river being so narrow where the bridge is located there is a very swift current especially in high water the draw span pier is not solid to the rest pier a sort of boom or frame work only extends from the draw pier to the rest pier, this causes cross currents & regular whirlpools & unless a boat has a big head of steam & is very powerful it is almost impossible to hold a boat steady. All heavy tows going up stream have to be split or divided & hauled under the bridge on

the Illinois side by boat going above bridge & passing a line down to the barges.

WM. BURKE.

(Following endorsements on back:)

File Box No. 17.

53. 1378/20.

U. S. Eng. Office.

Rec'd Apr. 15, 1905.

Rock Island, Ill.

Capt. Wm. Burke,

Diamond Jo Line Steamers,

St. Louis, Mo.

349 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

I am perfectly familiar with the Hannibal bridge.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

I consider it almost a bar to navigation especially in high water

everything is carried with a cross current against the abutment pier of the draw on the Missouri side.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation.

Move the draw next to the Missouri shore then put in a good shore protection above and below the bridge the same as the Winona and La Crosse bridges.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

I am in favor of moving the draw to the Missouri shore for protection to floating crafts.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

I consider it the most dangerous bridge.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

The pier that the Missouri end of the draw rests on is the most dangerous pier of the bridge and I would estimate that it has destroyed a \$100,000 worth of property for lumbermen and steamboat men engaged in the rafting interest.

7. Can you give other facts having a bearing on the question?

The river is very narrow where the bridge expands it and in high water the current becomes very swift and the whole volume of water with its cross current throws all floating crafts with great force toward the Missouri shore. For the safety of steamboats and floating crafts I would suggest that the draw be placed on the first pier from the shore and a good boom or slide be put in on the Missouri shore above and below the bridge.

IRA A. FULLER.

(Following endorsements on back:)

File Box No. 17.

54. 1378/21.

U. S. Eng. Office.
Rec'd Apr. 15, 1905.
Rock Island, Ill.

Capt. Ira Fuller,
Pepin, Wis.

351 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

I have been running boats and rafts through the Hannibal bridge for the last 35 years.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes I do consider the Hannibal bridge an unreasonable obstruction first on account of rip rap built outside the Piers 2nd because it is too narrow and nothing to keep the water from boiling through the draw Pier.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

The best thing would be to move the draw to the Missouri shore and put a boom up the shore above the bridge and the draw pier built up solid with stone or wood or both.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

352 Yes by all odds.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

Sinking of the Str. Dictator.

Sinking of the Str. Little Eagle.

Sinking of the Str. Flying Eagle.

Tearing off the wheel house of the Str Clinton. I also know of many rafts being badly damaged. I had some lumber that sunk by the whirling of the water.

7. Can you give any other facts having a bearing on the question? (No answer given.)

A. F. HOLLINSHEAD,
Clinton, Iowa.

(Endorsements as follows on back:)

File Box No. 17

55. 1378/22.

U. S. Eng. Office.
Rec'd Apr. 15, 1905.
Rock Island, Ill.

Capt. A. F. Hollinshead,
Clinton, Iowa.

353 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes. At the Hannibal Bridge in high water we have the strongest current on the Upper Miss. outside the Rapids. The current is not straight with the draw, and there are no approaches.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

(No answer.)

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening.

Most emphatically yes.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

The tow boats Dictator and Little Eagle and the Excursion Steamer Flying Eagle and her Barge have been total losses, within my experience, by striking the piers of the Hannibal Bridge. Neither of the three was in any way disabled before she struck.

7. Can you give other facts having a bearing on the question?

There has been much loss of time and money in the aggregate by boats having to lay up and wait for daylight, when they could have run the other bridges with safety on same stage of water and with same weather. While this loss has been great I have no idea of what it would count up in dollars.

Yours resp'tly

W. A. BLAIR, *Mgr.*

(Following endorsements on back:)

File Box No. 17.

56.

U. S. Eng. Office.

Rec'd Apr. 15, 1905.

Rock Island, Ill.

Capt. W. A. Blair,

Prest. Carnival City Packet Co.,

Davenport, Iowa.

SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

I have run the Hannibal Bridge for the last 18 yrs. with heavy tows as a Pilot.

2. Do you consider the Hannibal Bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

I do,—it is *a* difficult to enter the draw going down stream with a heavy tow, and doubly so in high water. I have had serious trouble in a number of occasions entering *entering* draw on account of lack of boom or fence, cross currents and swift water make it very dangerous.

3. What do you consider the best plan for making the passage of Hannibal Bridge more safe and convenient for all classes of navigation?

Construct a rest pier on the west shore, use old west pier for pivot pier, use old pivot pier for east rest pier, that making opening along the west shore. Construct a fence above and below if necessary, that I believe would be safe and convenient to all class of navigation.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

That I believe would be the best and safest for all class of navigation.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

I believe the Hannibal bridge the most dangerous, without exception.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

"The Dictator sunk there, loss about \$80,000.00, Little Eagle, loss about \$30,000.00, the Flying Eagle, loss about \$60,000.00, and enough other losses to make the total reach \$500,000.00.

7. Can you give other facts having a bearing on the question?

I have lost one barge and part of a tow there myself.

H. H. POLLOCK.

(Following endorsements on back:)

File Box No. 17.

57. 1378/24.

U. S. Eng. Office.
Rec'd Apr. 15, 1905.
Rock Island, Ill.

Capt. H. H. Pollock,
Rock Island, Ill.

357 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes. On account of draw being out in river without any protection; also side draft in high water.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation.

Such as the Engineer Department suggests.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

(No answer to this question.)

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes, in high water.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

357½ Str. Flying Eagle & barge wrecked, \$10,000.00.

"Ella May" damaged, \$2,000.00.

7. Can you give other facts having a bearing on the question?

(No answer.)

J. M. RICHTMAN.

(Endorsements on back as follows:)

File Box No. 17.

58. 1378/25.

U. S. Eng. Office.
Rec'd Apr. 15, 1905.
Rock Island, Ill.

Capt. J. M. Richtman,
Nauvoo, Ill.

358 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

"Yes."

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes.—Account of the narrowness of the channel from shore to shore formation of a sand bar above the bridge near Illinois shore, causing very swift water and cross current on West Pier and no "sheer boom" or protection *whatever*, for safety for boats.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

By changing the Draw pier, to the West side or Missouri shore so as to use the shore span for navigation purposes with a "Shear Boom" above Draw so as can be used to drop through.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes, as to answer to question #3.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

There are several instances but I am not able to just enumerate them to you.

7. Can you give other facts having a bearing on the question?

I have been on boats that have had to "tie up" on account of High Water and the Captain considering it unsafe to pass through the draw as no Fence or Shere boom to land against to insure safety. *More than one instance.*

JULE T. CALHOUN.

(Indorsements on back as follows:)

File Box No. 17.

59. 1378/26.

U. S. Eng. Office.
Rec'd Apr. 15, 1905.
Rock Island, Ill.

Capt. Jule T. Calhoun,
Burlington, Iowa.

360 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes in former years.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation and if so, why?

The absence of guard fences sheer booms and deposits of stone about the piers which I will say makes it very difficult.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

I would consider moving the draw to the west so as to bring one opening near the Missouri shore with guard fences or booms above and below the shore draw.

4. Are you in favor of moving the draw to the west so as to bring

one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes. I am in favor of this improvement.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes.

6. What examples are there within your knowledge of
361 loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

I have never met with any damages at the Hannibal bridge, as tows has always been dropped through the span west of the draw, near the Missouri shore, and would run through the draw with the light boat, which takes some little time.

7. Can you give other facts having a bearing on the question?

A change of the draw to the west with one opening near the Missouri shore, with guard fences or booms along shore draw, would make it very safe, and much quicker, in passing through the Hannibal bridge.

Yours respt.,

M. L. DILLON,

73 Mackubin St., St. Paul, Minn.

(Endorsements on back as follows:)

File Box No. 17.

60. 1378/27.

U. S. Eng. Office.

Rec'd Apr. 15, 1905.

Rock Island, Ill.

Capt. M. S. Dillon,

La Crosse, Wis.

362 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

We have run rafts and boats through the Hannibal bridge for a number of years.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

We do because the draw is out in the river without any sheer boom or protection of any kind and in high water the current is so swift that it forms so many eddies that it is hard to handle boat.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

By putting draw at or near the Missouri shore and put sheer boom or fence down that shore.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

We are in favor of putting draw so that one opening will come next to Missouri shore.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

We consider the Hannibal bridge the most dangerous on the Miss.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

There has been a number of boats lost on the Hannibal bridge among them being the Flying Eagle Little Eagle and the Dictator and others which we do not recall just now.

7. Can you give other facts having a bearing on the question?

Our Pilots all complain of the eddies around the draw in high water.

C. LAMB & SONS.

(Endorsements on back.)

File Box No. —.

61. 1378/28.

U. S. Eng. Office.

Rec'd Apr. 17, 1905.

C. Lamb & Sons,

Clinton, Iowa.

364 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

I run my boats through the Hannibal bridge during navigation and am familiar with the difficulties at that point.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

I do because the draw is out in the river, without any sheer boom or protection of any kind, and in high water the current being so swift that forms so many eddies that it is very hard to handle boats.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

Would suggest moving the draw to or near the Missouri shore and place a sheer boom or fence down that shore.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of

guard fences or booms along that shore above, and if necessary below the shore draw opening.

I am.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

365 I do.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge. These facts are desired in order that the amount of loss may be approximately estimated.

A number of boats have been lost, namely Flying Eagle Little Eagle, the Dictator and others.

7. Can you give others facts having a bearing on the question?

All river men who run the Hannibal bridge whom I have come in contact with complain of the eddies around the draw in high water.

L. LAMB.

(Endorsements on back as follows:)

File Box No. —.

62. 1378/29.

U. S. Eng. Office.
Rec'd Apr. 17, 1905.
Rock Island, Ill.

L. Lamb,
Clinton, Iowa.

366 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes. First; On account of bridge being built in a narrow place in the river. Second; On account of no shear-boom or protection of any kind to assist the boats in passing through.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

I consider the best plan is to move the draw to the west, so as to bring the opening next to the Missouri shore and then build guard-fences or drive piling along the Missouri shore above openings.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes.

367 6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

The loss of Steamers Dictator, Friendship, Little Eagle and Flying Eagle. Knocking off wheel of Str. Clinton, disabling the Harry Johnson, with the loss of several lives, as well as the loss of each boat.

7. Can you give other facts having a bearing on the question?

The Eagle Packet Company towed heavy barges to Keokuk and points above, former years ago never allowed their steamers to attempt to pass through this bridge after dark, either up stream or down stream with barges at a great expense to the Company. During high water we would take one barge through at a time and on several occasions hit the piers and damaged the barges to the expense of the Company.

WM. LEYHE.

(Endorsements on back as follows:)

File Box No. —.

63. 1378/30.

U. S. Eng. Office.
Rec'd Apr. 17, 1905.
Rock Island, Ill.

Capt. Wm. Leyhe,
Eagle Packet Co.,
St. Louis, Mo.

368 SIR: 1. Do your duties now, or have they in former years required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes. First, on account of bridge being built in a narrow place in the river. Second on account of no sheer boom or protection of any kind to assist the boats in passing through.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

I consider the best plan is to move the draw to the west, so as to bring the opening next to the Missouri shore and then build guard fences or drive piling along the Missouri shore above openings.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

369 Yes.

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

The loss of the Steamers Dictator, Friendship, Little Eagle and Flying Eagle. Knocking off wheel of Str. Clinton, disabling the Harry Johnson, with the loss of several lives, as well as the loss of each boat.

7. Can you give other facts having a bearing on the question?

The Eagle Packet Company towed heavy barges to Keokuk and points above, former years ago never allowed their steamers to attempt to pass through this bridge after dark, either up stream or down stream with barges at a great expense to the Company. During high water we would take one barge through at a time and on several occasions hit the piers and damaged the barges to the expense of the Company.

HENRY LEYHE.

(Endorsements on back as follows:)

File Box No. —.

64. 1378/31.

U. S. Eng. Office.

Rec'd Apr. 17, 1905.

Rock Island, Ill.

Capt. Henry Leyhe,

Eagle Packet Co.,

St. Louis, Mo.

- 370 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes. Because of no protection.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

By moving the draw to the west so as to bring one opening next to or near the Missouri shore and the building of guard fences or booms along that shore above and if necessary below the shore draw opening.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of

guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes.

371 6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

The Str. Dictator and Flying Eagle sunk, the Little Eagle hit the bridge but don't remember what damage was done. The Str. Clinton lost her wheel. The Minneapolis lost her guard. The Ella May lost her guard. The Gem City broke a water wheel beam.

7. Can you give other facts having a bearing on the question?

One great fault with that bridge is not having it filled in between the pivot pier and *brakewater* as all other bridges are so as to prevent the water boiling around in the passing spans. For the minute the boat's rudders gets in the boiling water she loses all steerage way.

C. P. MARTIN.

(Endorsements on back as follows:)

File Box No. 17.

65. 1378-32.

U. S. Eng. Office.

Rec'd Apr. 21, 1905.

Rock Island, Ill.

C. P. Martin,

Pilot Steamer Sidney,

St. Louis, Mo.

372 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts, through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

They do, and I am.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so why?

Yes, because of the strong side current and no sheer boom for protection. Draw pier not straight with the current.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

Move the draw down to the Missouri shore with strong boom or guard fences not less than 600 feet above and 200 below.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

I am.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes by far.

373 6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

Little Eagle & Flying Eagle total loss. James Watson, Kit Carson, Bella Mac, loss of time, logs and lumber.

7. Can you give other facts having a bearing on the question?
(No answer.)

J. D. LAMB.

(Following endorsements on back:)

File Box No. 17.

66. 1378/33.

U. S. Eng. Office.
Rec'd May -3, 1905.
Rock Island, Ill.

J. D. Lamb,
Clinton, Ia.

374 SIR: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal bridge, and are you familiar with the difficulties of navigation at that point?

Yes.

2. Do you consider the Hannibal bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

I do. On account of there being a very swift cross current there and no protection at draw pier. Have known of boats laying above bridge for 36 hours in windy weather.

3. What do you consider the best plan for making the passage of Hannibal bridge more safe and convenient for all classes of navigation?

Change the draw to the Missouri shore or build a sheer boom above and below draw-pier and one along shore pier.

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes.

5. Do you consider the Hannibal bridge the most dangerous of the Upper Mississippi River bridges?

Yes.

375 6. What examples are there, within your knowledge, of loss or damage resulting from collisions or delays due to the Hannibal bridge? These facts are desired in order that the amount of loss may be approximately estimated.

Have known of the Str. Sidney having to delay several times above bridge until wind went down so she could come through, at the same time she could and did come through Quincy Bridge. Other Steamers have had similar experiences.

7. Can you give other facts having a bearing on the question?

The Steamer Flying Eagle and Barge were destroyed on the bridge in 1903, with loss of life. In my opinion it would not have occurred had there been some guard fence or boom protection.

D. W. WISHERD,

Acme Packet Co.

(Endorsements on back as follows:)

File Box No. 17.

67. 1378/34.

U. S. Eng. Office.

Rec'd May 11, 1905.

Rock Island, Ill.

Capt. D. W. Wisherd.

Rock Island, Ill.

Durham.

376 (The cover of this Exhibit is endorsed as follows:)

Doc. 4.

Replies of pilots in reply to Circular of M'ch 25, 1905.

31 Statements printed in full in brief of Hughes & Sawyer,
Capt. W. R. Tibbals, *et al.*

Office, Chief of Engineers.

Jan. 15, 1906.

47489/39.

War Department.

Office of the Secretary.

Mar 3, 1906.

8247/15.

War Department.

377 United States Exhibit 6 is in the words and figures following, to-wit:

HANNIBAL, Mo., June 1, 1905.

To C. S. Riche, Major, Corps of Engineers, Rock Island, Ill.:

The Hannibal Bridge Company comes and respectfully shows that its bridge across the Mississippi River at Hannibal, Missouri, is so constructed as to give the least interference to free navigation. That the draw span is over the natural channel of the river, through which the current takes a straight course. That on each side of the pivot

pier the channel is more than twice as deep as between any of the other piers. That there has been no change in the channel of the river since the bridge was constructed in 1871. That the contemplated change of the draw span and piers of the bridge would not benefit navigation, and would entail large and useless expense upon the company.

Wherefore said company respectfully protests against any change in the present condition of the bridge, and asks that the bridge be allowed to remain as it now is.

Herewith submitted and as a part hereof, are the affidavits of Edward Webb, John L. Cruikshank, Geo. W. Dulany, N. L. Saunders, William Groves, Thos. B. London, Chas. W. Curtis, William L. Pound, J. C. Shaw, Albert F. Becker, Patrick Sullivan, James B. Culbertson, John J. Conlon, William T. Williamson, Geo. F. Morris, Monte C. Van Houten, John Kaiser, Aaron R. Levering, and George Elgin.

HANNIBAL BRIDGE CO.,

By GEO. A. MAHAN, *Att'y.*

EDWARD G. WEBB, on oath says, I began floating lumber
379 and logs down the Mississippi River to Hannibal before the Hannibal bridge was constructed, and continued that work long after it was built. I had charge of the logs of the Hannibal Saw Mill Company for over thirty years, and passed through the draw of the Hannibal bridge almost daily during the boating season for that time. I was on a great many different boats when they passed through the draw of that bridge during the time I was with the Saw Mill Company and they all went through in safety and without damage.

I am, and for more than thirty years have been familiar with the channel of the river at the bridge. The bridge is well located with reference to the channel and so the boats can pass through with the least trouble or difficulty. The channel has always remained in the same place and no change in the bridge would improve free navigation or in any way aid boats in passing the draw.

EDWARD G. WEBB.

Subscribed and sworn to before me this 31st day of May, 1905.
My term expires March 5th, 1909.

[Seal David Vasen, Notary Public, Adams County, Illinois.]

DAVID VASEN,

Notary Public, Adams County, Ill.

JOHN L. CRUIKSHANK, says I am a lumberman and we get
380 our lumber down the Mississippi River through the Hannibal Bridge, and I have had more than twenty years experience in the business.

I know the Hannibal bridge and learned the current and channel of the river there, by passing up and down the river through the draw span of the bridge. The draw span is in the natural channel of

the river and the bridge is so built that it does not interfere with navigation.

I do not believe any change in the present condition of the bridge is necessary or that such change would be of any benefit to steam-boating.

JOHN L. CRICKSHANK.

Subscribed and sworn to before me this 31 day of May, 1905. My term expires July 3, 1905.

[Seal William S. Snyder, Notary Public, Marion Co., Mo.]

WM. S. SNYDER,
Notary Public, Marion County, Mo.

381 GEORGE W. DULANY, on oath, says that he was a lumberman at Hannibal, Mo., for more than twenty-five years.

In that business we obtained our lumber down the Mississippi River by rafting and dropping same through the Hannibal bridge by boat. Our boats, during the length of time we were in business, handled through the bridge between 25,000,000 and 30,000,000 feet of lumber per year, during the boating season.

We never met with any accident, loss of property or injury to our boats. It was our universal custom to cut *loss* from the raft above the bridge and let the raft drop through next to the Missouri shore, the boat coming through the draw of the bridge and catching the raft below.

GEORGE W. DULANY.

Subscribed and sworn to before me this 31 day of May, 1905. My term expires July 27, 1907.

[Seal Warren J. Dakin, Notary Public, Marion County, Mo.]

WARREN J. DAKIN,
Notary Public, Marion County, Mo.

My Commission Expires July 27, 1907.

382 NATHAN L. SAUNDERS, on oath says, I have lived in the City of Hannibal since my birth, and have been fishing in the Mississippi River above and below the Hannibal Railroad Bridge for more than forty years. It was my duty as a fisherman to learn the channel of the river in order that I could properly set my nets. I knew the channel where the bridge is, long before it was built, and fished there. Since the bridge was built I have fished a great deal under it and around the piers and this has continued for years. During that time I have seen all kinds of boats passing through the draw as they went up and down the river, and have observed the effect of the current on the same. I have also noticed rafts of lumber and logs passing through there frequently for years. In this way I learned accurately where the channel is and the draught or current of water in it. The draw span of the bridge is over the channel where the water is deepest, and where the current runs

straight through. The pivot pier and all the piers of the bridge are built in the proper place so as not to interfere with the navigation of the river. If the span is moved it will take it out of the natural channel of the river. It is safest and best for free navigation to let the bridge remain in the position and condition that it is now.

N. L. SAUNDERS.

Subscribed and sworn to before me this 29th day of May, 1905
My term expires March 26th, 1908.

[Seal Albert R. Smith, Notary Public, Marion County, Mo.]

A. R. SMITH,

Notary Public, Marion County, Mo.

383 WILLIAM GROVES, on oath says, I have lived one-half mile North of the Hannibal Railroad Bridge on the banks of the Mississippi River for more than twenty years, and ran logs through the bridge for the Hannibal Saw Mill for twelve or fifteen years. I have fished in the river at, above and below the bridge, and have done this more or less for the last twenty years. In this work I have always used a skiff. This experience on the river was practically every day during the season that the river was open.

In running logs we used a steamboat and we passed backwards and forwards through the draw of the bridge. We never had any inconvenience, trouble or accident at the bridge. In this way I learned just where the channel is and I know it runs straight under the draw span of the bridge, and where it ran before the bridge was built. There would be no improvement to free navigation by changing the present condition of the bridge. It is built as safely as could have been constructed.

WILLIAM GROVES.

Subscribed and sworn to before me this 29th day of May, 1905
My term expires March 26th, 1908.

[Seal Albert R. Smith, Notary Public, Marion County, Mo.]

A. R. SMITH,

Notary Public, Marion County, Mo.

384 THOMAS B. LOUDON, says that for more than twelve years he was managing and owner of the steamboat, Harry Reid, and in boating season during that time he run the Hannibal Railroad Bridge with the boat almost daily, and very frequently six or eight times a day. Our business being running lumber and logs and towing barges through the bridge. In that time I learned the conditions at the bridge and know the relative position of the channel and piers. I was acquainted with the natural channel there before the bridge was built and there never has been any change in the channel. The natural channel runs through the draw span and on either side of the pivot pier, and straight through. The bridge as it now stands interferes with free navigation as little as any bridge built on piers at that point would. No change in the present loca-

tion of the piers or condition of the bridge would be any improvement or betterment.

THOMAS B. LOUDON.

Subscribed and sworn to before me this 29th day of May, 1905.
My term expires July 27, 1907.

[Seal Warren J. Dakin, Notary Public, Marion County, Mo.]

WARREN J. DAKIN,
Notary Public, Marion County, Mo.

*

385 CHARLES W. CURTS, says, I live in Hannibal, Mo. I am
now, and ever since the year 1859, have been a duly licensed
pilot on the Mississippi River. During that period I have run all
kinds of crafts, from the largest packets to smaller boats. I generally
run from St. Louis North, and have handled boats through the Han-
nibal Railroad Bridge continually, for years, and a large number
of times each year I was on the river. I made a study of that bridge
and the channel as I also did of other bridges that I had to take
boats through. I am perfectly familiar with the Hannibal bridge
and of the natural channel of the river there. The river is deep
and narrow at that point and the channel has never changed. I
have known it for more than forty years and long before the bridge
was built. The bridge was correctly placed and so as not to inter-
fere with the channel any more than any bridge would that was
built on rock columns. The draw span is over the main natural
channel and the water on each side of the pivot pier is deeper than
between any other piers of the bridge. The channel runs straight
through the draw span and at right angles with the bridge. The
piers could not have been placed better and no improvement would
be made by moving them. In order that navigation there should
be safe, the piers should remain as they are, and the draw span
where it is. The bridge should not be touched, but should be
386 let alone as it is. It cannot be improved upon. I would
rather run that bridge than others on the river. I have hit
other bridges but never struck that bridge. Of course, care should
be used in passing through any bridge built on piers, but no more
care is required at the Hannibal bridge than any other on the river.
I think it would be dangerous to navigation to make any changes
in that bridge.

CHARLES W. CURTS.

Subscribed and sworn to before me this 27th day of May, 1905.
My term expires March 26th, 1908.

[Seal Albert R. Smith, Notary Public, Marion County, Mo.]

A. R. SMITH,
Notary Public, Marion County, Mo.

*

387 WILLIAM L. POUND, being sworn on oath says, I have a pilot's license on the Mississippi River. My residence is Hannibal, Mo. I have a great many times run the draw of the Hannibal bridge and know the location of the piers and the draw span. I have observed and know the current of the river and the channel of the same where they pass through the bridge. The pivot pier and the draw span are so placed that boats can pass on either side of the pivot pier and keep in the natural channel of the river. The piers are built so as to interfere with the natural channel of the river and the passage of boats as little as possible. No change in the present position and condition of the bridge would be of any benefit or make navigation any safer than it is now.

WILLIAM L. POUND.

Subscribed and sworn to before me this 27th day of May, 1905.
My term expires March 26th, 1908.

[Seal Albert R. Smith, Notary Public, Marion County, Mo.]

A. R. SMITH,
Notary Public, Marion County, Mo.

388 JAMES C. SHAW, on oath says, I am a licensed pilot on the Mississippi River and live at Hannibal, Missouri.

I know the Hannibal Railroad Bridge and the river at that point, and I am familiar with the channel and current of the river there. I have passed through the draw many times both day and night, and know that the draw span of the bridge is in the natural channel of the river and where the current passes straight through the bridge. The bridge piers are located with reference to the channel in the safest and best places for navigation. I do not think any change from the present condition of the bridge would be beneficial to steamboating.

J. C. SHAW.

Subscribed and sworn to before me this 26th day of May, 1905.
My term expires March 26th, 1908.

[Seal Albert R. Smith, Notary Public, Marion County, Mo.]

A. R. SMITH,
Notary Public, Marion County, Mo.

389 ALBERT F. BECKER, being sworn says, I have worked on the Hannibal Bridge across the Mississippi River as foreman and engineer for nine years, and am of course, very familiar with the bridge, piers, draw and the channel. The bridge is built in the best manner to suit the current and channel there and the piers and draw are at proper places. There never has been any change in the channel at the bridge.

Between the West or Missouri shore and the first pier, the greatest depth of water is eighteen feet. On the West side of the draw or pivot pier, the water is 50 1/2 feet deep. Any change in the

draw span would take it away from the natural channel of the river. No change in the condition of the Bridge is necessary.

In 1896, more than 1200 boats passed through the draw in safety, and something less than that number each year down to 1904, when 470 passed through. All the boats passed the draw safely except the Flying Eagle in 1903. She was an excursion boat and had a large barge in tow, too large for her to manage safely. The river was a raging torrent about as high as ever known. The boat was coming up stream and her wheel hung on the float, but that was not the fault of the bridge.

The bridge does not interfere with navigation more than any bridge at that place built on piers would do. No change in
390 the bridge would be of any benefit to navigation or make it safer. Boats properly managed can pass through the draw without danger or damage.

ALBERT F. BECKER.

Subscribed and sworn to before me this 26th day of May, 1905.
My term expires March 26th, 1908.

[Seal Albert R. Smith, Notary Public, Marion County, Mo.]

A. R. SMITH,

Notary Public, Marion County, Mo.

391 PATRICK SULLIVAN, on oath says, I have worked on the Hannibal bridge at different times for eighteen years and know the location of the bridge and the natural boat channel of the river. The bridge was built and the piers and draw were put in the best place to interfere with navigation the least. No change in the recent location or condition of the bridge would be of any benefit nor would it improve navigation there. The channel remains now as I knew it more than eighteen years ago. The water is very deep in the present channel on each side of the pivot or draw pier, but grows more shallow as you approach the Missouri shore. Steamboats properly handled can pass through the draw in safety and without inconvenience.

PATRICK SULLIVAN.

Subscribed and sworn to before me this 26th day of May, 1905.
My term expires March 26th, 1908.

[Seal Albert R. Smith, Notary Public, Marion County, Mo.]

A. R. SMITH,

Notary Public, Marion County, Mo.

*

392 JAMES B. CULBERTSON says on oath, that I was Superintendent of the Hannibal Bridge for six years and during that time I became very familiar with the channel of the Mississippi River there, and of the location of the bridge piers and draw. I also observed large numbers of boats as they passed through the draw. In my judgment the draw & piers were properly placed with reference

to the channel. Steamboats when properly handled passed the draw in safety. I have known the channel at the draw more than sixteen years and there never has been any change. I believe the bridge interferes with navigation as little as any bridge built on piers at that place would, and no change in the location of any of the piers or the draw of the bridge would be of any benefit to navigation. I am now living on a farm near Hannibal.

JAMES B. CULBERTSON.

Subscribed and sworn to before me this 26th day of May, 1905.

[Seal Warren J. Dakin, Notary Public, Marion County, Mo.]

WARREN J. DAKIN,

Notary Public, Marion Co., Mo.

My Commission Expires July 27, 1907.

*

393 I, JOHN J. CONLON, on oath say that I am now, and for more than twenty years past have been continuously in the lumber business in the City of Hannibal.

Nearly all the lumber I sell is rafted down the Mississippi River and passes the Hannibal bridge over the river. I am familiar with the channel of the river at that point. The river is narrow there, and the passage way on each side of the pivot pier of the bridge is the natural channel of the river, and that the bridge is now located does not interfere with the navigation of the river. The channel has not changed there in twenty years. In my opinion no change would benefit the present situation.

JOHN J. CONLON.

Subscribed and sworn to before me this 26 day of May, 1905.
My term expires July 3, 1905.

[Seal William S. Snyder, Notary Public, Marion Co., Mo.]

WM. S. SNYDER,

Notary Public, Marion County, Mo.

394 WILLIAM T. WILLIAMSON, under oath says, I am the engineer on the boat, J. T. Davis, and am on the river all the time when it is open, and have known the Hannibal bridge across the Mississippi River for a great many years, and know the current of the river at the bridge. The river is narrow and deep at that point. I do not believe the bridge as now located interferes with the navigation of the river to any greater extent than any other bridge would, that was built on piers at that point. There has been no change in the channel there, and a change in the bridge is not necessary as it would be of no benefit.

WILLIAM T. WILLIAMSON.

Subscribed and sworn to before me this 26 day of May, 1905.
My term expires July 3, 1905.

[Seal William S. Snyder, Notary Public, Marion Co., Mo.]

WM. S. SNYDER,
Notary Public, Marion County, Mo.

*

395 GEORGE F. MORRIS, being duly sworn says, I have lived in Hannibal for thirty years, and am now and for more than ten years have been the captain of the boat, J. T. Davis. I know the location of the Hannibal bridge and have known it ever since it was built. Am on the river nearly every day during boating season. The bridge was properly built over the channel of the river as it then existed, and there has been no change in the channel since. In my judgment, the bridge as now constructed, interferes with navigation as little as it would if any change was made, provided the bridge still remains on piers.

GEO. F. MORRIS.

Subscribed and sworn to before me this 26 day of May 1905.
My term expires July 3, 1905.

[Seal William S. Snyder, Notary Public, Marion Co., Mo.]

WM. S. SNYDER,
Notary Public, Marion County, Mo.

*

396 MONTE C. VAN HOUTEN, being sworn says, I am now fireman on the boat, J. T. Davis, plying in waters of the Mississippi River at Hannibal, and have been for about five years. Prior to this work, I was fireman on the steamer Harry Reid, for about sixteen years, and for that period of time I passed through the draw of the Hannibal bridge across the Mississippi River at Hannibal, Mo., almost every day from one to six times, during the boating season. This season here lasted nine months.

I observed and know the location of the bridge and piers and am familiar with the channel of the river at the bridge and the general conditions there. I knew the bridge and channel at the time the bridge was built. The piers were placed in the right place and the bridge built in the proper manner with reference to the channel and so as to interfere with navigation as little as any pier bridge constructed in any other manner at that point would. The channel has always remained the same and is right where it was when the bridge was built.

In all my experience on the boat we never had any trouble in running the draw in perfect safety. We never met with any accident at any time.

I have also frequently floated rafts of lumber and logs through the bridge, and never had any difficulty in running the bridge, nor did I ever have any accident or damage to the rafts.

397 I do not believe that any change in the construction of the bridge would benefit navigation.

his
MONTE X C. VAN HOUTEN,
mark.

Witness to

A. R. LEVERING.

Subscribed and sworn to before me this 29 day of May, 1905.
My term expires July 5, 1905.

[Seal William S. Snyder, Notary Public, Marion Co., Mo.]

WM. S. SNYDER,
Notary Public, Marion County, Mo.

*

398 JOHN KIZER, on oath says, I worked on the steamer, Harry Reid, at different times from 1882 to 1900, and during that time passed through the draw of the Hannibal bridge a great many times every season. There was no difficulty whatever in running that draw. I also passed through the bridge a great many times on a number of other boats, and never had any trouble with a steamboat at the bridge. I well know the channel and location of the bridge. In my judgment the piers and draw are safely and properly placed so as not to interfere with navigation. I do not believe any change in the bridge would be any improvement. There has been no change in the channel since the bridge was built. I knew that channel long before the bridge was built, as I lived on the bank of the river a short distance above the bridge.

JOHN KAISER.

Subscribed and sworn to before me this 29th day of May, 1905.

[Seal Warren J. Dakin, Notary Public, Marion County, Mo.]

WARREN J. DAKIN,
Notary Public, Marion Co., Mo.

*

399 AARON R. LEVERING, on oath says, I have been in the Banking business in Hannibal, Mo. for thirty-five years, and am familiar with the Hannibal Bridge, and have known the same since it was finished in 1871. During all that time large numbers of boats have passed through the draw span each year, probably as many as any other bridge on the river, except St. Louis bridges. In the spring of 1876, during a period of very high water, the steamer, Dictator, struck a pier and was wrecked.

In the year 1877 the boat, Clinton, broke part of her wheel house by striking a pier. The water was very high at this time.

During the flood of April, 1882, the tow boat, Little Eagle, was wrecked by hitting a pier.

About the year 1873, in the height of a great flood the boat, Friendship, was wrecked at the bridge.

In the spring of 1903, when the water in the Mississippi was about as high as ever known, the boat, Flying Eagle, struck the bridge and was wrecked.

All of these boats but the Clinton were handling barges.

It was generally understood and believed at the time that the wrecks were not caused by any fault in the position or construction of the bridge, but as a consequence of the high stage of 400 water.

A. R. LEVERING.

Subscribed and sworn to before me this 3rd day of June, 1905.
My term expires March 26, 1908.

[Seal Albert R. Smith, Notary Public, Marion County, Mo.]

A. R. SMITH,

Notary Public, Marion County, Mo.

401 GEORGE ELGIN, being sworn says, I was on the steamer Harry Reid, several years and had charge of her one season. Our business caused us to pass through the Hannibal Bridge several times a day during the boating season. I am familiar with the channel there and with the location of the bridge piers. I do not think the bridge is dangerous for free navigation as I believe the piers are in proper place with reference to the channel.

I have floated lumber and logs through the bridge for the last twenty five years and never found any difficulty in running the bridge. I do not think any change will benefit navigation.

GEO. ELGIN.

Subscribed and sworn to before me this 5th day of June 1905.
My term expires March 26, 1908.

[Seal Albert R. Smith, Notary Public, Marion County, Mo.]

A. R. SMITH,

Notary Public, Marion County, Mo.

402 (Following endorsements — cover of this bunch of affidavits.)

(30) File Box No. 17. Doc. 6.

1378/34 U. S. Eng. Office,
Rec'd Jun- 6, 1905,
Rock Island, Ill.

Protest Against

Changing

Hannibal Railroad Bridge and Affidavits 19 in Number on the Part
of the Bridge Company.

Office Chief of Engineers

Jan. 15, 1905.

47489/45.

War Department.

Office of the Secretary,

Mar. 3, 1905.

8247/14.

War Department.

May 16/08, Certified Copy of Pages Marked thus * to S. W. with
Ind. on 47489/147.

403 United States Exhibit 8 is in the words and figures following, to-wit:

STATE OF ILLINOIS,

County of Cook:

I, H. W. PARKHURST, on oath says:

I am fifty-eight years old, am at present acting as consulting Engineer on Special Matters in the Bridge Department of the Illinois Central Railroad. I was one of the Assistant Engineers engaged next to Mr. E. L. Corthell, Resident Engineer of the Hannibal Bridge across the Mississippi River. The bridge was located with the draw span on the westerly side with only one short fixed span next to the shore. This shore is a rock bluff and extends in a straight line at right angles to the bridge and parallel to the stream for upwards of half a mile above the bridge. The current of the river sweeps around a point about half a mile above the bridge and

then follows the bluff until it passes Hannibal. I consider that the location of the draw was absolutely fixed by the position of the channel, this being determined by soundings and by float lines. I was on the bridge until it was nearly completed and resided in Hannibal for some time afterwards. Have frequently seen steamboats and rafts run through the bridge and know that the draw was easy to run through. I have seen large rafts float down the river without tow boats and pass through the bridge without difficulty; at times very large rafts being split in two by the pilot one-half going on each side of the center or pivot pier, and then being coupled together again after passing through the draw. This is an evolution which could not have been performed with the draw pier not located in the middle of the channel. If the draw should be moved one span west, the east end of the draw would be the only practicable channel, the west side would be too shallow and too near the shore. I should judge that such a change would tend to injure the navigation through the bridge to a very serious extent.

H. W. PARKHURST.

Subscribed and sworn to before me this 7th day of July, 1905.

[Seal Andrew P. Humburg, Notary Public, Cook County, Ills.]

ANDREW P. HUMBURG,

Notary Public.

(Endorsed on back as follows:)

File Box No. 17.

82. 1378/48.

U. S. Eng. Office.
Rec'd Jul- 8, 1905.
Rock Island, Ill.

Affidavit of H. W. Parkhurst *in re*

Complaint against Hannibal Bridge.

*

405 STATE OF NEW YORK,
County of New York, ss.:

ELMER L. CORTHELL being duly sworn deposes and says, that he was employed as Resident engineer in the construction of the Combined Railroad & Highway Bridge over the Mississippi River, immediately above the city of Hannibal, Missouri, and that he assisted in the preliminary surveys and investigations under the supervision of the late Colonel Ed. D. Mason, Chief Engineer.

That the bed of the river was examined by numerous borings to ascertain the underlying material and the slope of the bed rock. That the direction and velocity of the currents were ascertained by extended and repeated float observations. That the line of the

bridge was established from these data and the configuration of the shore thus obtained. That the spans were designed and located to conform to the physical conditions and to best accommodate the navigation interests. That one of the principal reasons for locating the bridge where it is was to place it where the currents were parallel to the shore and where, by the physical conditions the channel for navigation would have a long, straight stretch above the bridge and would not change in the future. That the Channel is held permanently in its place by the straight rocky bluff of the river, which extends for more than a mile above the bridge.

406 That the bridge as designed was approved by the United States Government authorities under the special Act of Congress approved July 25, 1866. That in that year the United States Government engineers also made a survey of this part of the river, with the location of the bridge in view. The location of the draw span was in the deepest part of the river and where the current at all stages of the water is at right angles to the axis of the bridge. That an examination of the charts of the currents of all the bridges on the upper Mississippi led the deponent to the conclusion that the current direction in reference to the Hannibal draw span is, for convenience and safety of navigation, equal, if not superior, to any other of the draw spans in the various bridges above Hannibal on the Mississippi. That in deponent's opinion it would be detrimental to move the draw span from its present position in either direction, for the pivot pier is now in the deepest part of the channel, leaving a deep channel on either side, and where the currents are always parallel to the shore line of the river. That from the pivot pier towards the western shore, the bed of the river slopes upward very rapidly—both the slope of the rocky bed and of the over-lying material. That any movement of the opening in that direction would be especially injurious to navigation.

ELMER L. CORTHELL.

Subscribed and sworn to before me, this 3rd day of July, 1905.

[Seal Walter G. Smith, Notary Public, New York County, N.Y.]

WALTER G. SMITH,

Notary Public, New York County, N. Y.

*

407

(Endorsements on back:)

File Box No. 17.

83. 1378/44.

U. S. Eng. Office.
Rec'd Jul- 6, 1905.
Rock Island, Ill.

Affidavit of Elmer G. Corthell *in re*
Complaint against Hannibal Bridge.

408 JAMES W. LEACH, being duly sworn, says, I am 52 years old, have lived on the banks of the river just below the Hannibal Railroad Bridge across the Mississippi River, and in plain view of the same, and have lived at that place since 1870. I began working at the Bridge as watchman in 1872 and worked there continuously until 1888, and during that time I frequently made soundings of the river under the bridge,—as often as once every month. Since 1888 and up to 1902, I made my living by fishing much of the time under the bridge. I am perfectly familiar with the current there and the depth of the river. The pivot pier of the bridge is located correctly and in the proper place with reference to navigation. The natural current of the river is on each side of the draw when it is open, and the current runs straight through the draw. I have seen civil engineers make actual tests a number of times by floating through the draw span big painted cedar floats, and they always showed that the natural navigation channel runs straight through the draw span. These engineers would go above the bridge one half mile and put the floats out in the channel a certain distance from shore and then pick them up after they had passed through the bridge and see what difference there was in the distance from shore. They would not vary fifty feet from the starting and stopping point. These floats never failed to pass through the draw span of the bridge. To change the pivot pier either way would take it out of its proper place and force boats out of the natural
409 channel and would be very injurious to navigation through the bridge. The bridge should remain as it is. I am familiar with all accidents at the bridge, and every one of them without exception was caused by the very high water, the river being a raging flood at the times.

his
JAMES W. x LEACH.
mark

Subscribed and sworn to before me, this 6th day of July, 1905.
My term expires March 26th, 1908.

[Seal Albert R. Smith, Notary Public, Marion County, Mo.]

A. R. SMITH,
Notary Public, Marion County, Mo.

(Endorsements on back:)

File Box 17,
U. S. Eng. Office,
Reed, July 7, 1905.
Rock Island.
S4. 1378/46.

Affidavit of James W. Leach *in re*
Complaint Against Hannibal Bridge.

410 ANDREW O. CUNNINGHAM on oath says, that he is the Chief Engineer of the Wabash Railroad Company. That he is familiar with the current of the Mississippi River where it passes through the Hannibal Railroad Bridge. That the eddies below the Bridge are just such as is found at any other pier bridge across the Mississippi River, and do not in any wise prevent boats from passing up or down the river, and in his opinion does not have any effect upon the wheel or steering gear of a boat. These eddies are produced simply by the obstruction of the piers near the surface of the water, and not by the rip rap. The rip rap around the piers does not in any way interfere with navigation since there is sufficient water above the highest point of the rip rap to carry all boats over the same in safety. The highest point of this rip rap being nine feet below gauge mark 11 ft. 5 in.

ANDREW O. CUNNINGHAM.

Subscribed and sworn to before me this 26th day of October, 1905.
My commission expires March 26, 1908.

[Seal Albert R. Smith, Notary Public, Marion County, Mo.]

A. R. SMITH,

Notary Public, Marion County, Mo.

(Endorsement on back:)

96.

Affidavit

Andrew O. Cunningham.

*

411 EDWARD SHELAH on oath says, that he is the Engineer of Maintenance of Way of the Wabash Railroad Company. That he knows the current and is familiar with it where it passes through the Hannibal Railroad Bridge, of the Mississippi River. That the eddies below the Bridge are the same as is found at any other piers across the Mississippi River, and do not in any way prevent boats from passing up and down the river, and in his opinion do not have any effect upon the rudder or steering gear of a boat. These eddies are produced simply by the obstruction of the piers near the surface of the water, and not by the rip rap underneath. The rip rap around the piers do not in any way interfere with navigation as there is sufficient water above the highest point of the rip rap to carry all boats over the same in safety. The highest point of this rip rap is nine feet below gauge mark 11 ft. 5 in.

EDWARD SHELAH.

Subscribed and sworn to before me this 26th day of October, 1905.
My commission expires March 26, 1908.

[Seal Albert R. Smith, Notary Public, Marion County, Mo.]

A. R. SMITH,

Notary Public, Marion County, Mo.

(Endorsement on back:)

97.

Affidavit Edward Shelah.

412 STATE OF MISSOURI,
City of St. Louis, ss:

GEORGE E. FRANCISCO being duly sworn on his oath says, that the officers and employes in charge of the operation of the bridge over the Mississippi River at Hannibal, Mo., now keep and have, for more than the twenty years last past kept, a full and complete record, showing the names of all boats passing each day up and down said river through the draw span of said bridge, and the hour of the day or night at which the draw of said bridge has been opened for their passage. That he has made a careful examination of the said books and records of the Hannibal Bridge Company from the year 1884, down to the present time. That during that period steamboats passed through the draw of the Hannibal Bridge 30,823 times, and out of that number of boats, there was 5,955 that passed through in the night time, or an average of about 34 boats per month during the boating season. That during the month of October, 1905, boats passed through the bridge 139 times, out of which 31 made the passage in the night time. That since the year 1884 down to the present time there has not been a single accident to any boat passing through the draw span of the bridge, or an injury of any character to any boat, except to the Flying Eagle and barge of June 3, 1903, when that boat in attempting to pass the bridge during very highwater struck the East pier and was sunk and four lives were lost; and the steamer, Park Bluff—

(Following endorsements appear on back of cover to this bunch of affidavits:)

413

Doc. 8.

Additional Affidavits for the Bridge Company.

H. W. Parkhurst, *et al.*

Office Chief of Engineers.

Jan. 15, 1906.

47489/44.

War Department.

Office of the Secretary.

Mar. 3, 1906.

8247/13

War Department.

May 16 08, Certified copies of pages marked thus * to S. W. with ind. on 47489/147.

- 414 (Following endorsements appear on back of cover to this bunch of affidavits:)

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May 16 '08, Certified copies of pages marked thus * to S. W. with ind. on 47489/147.

- 415 United States Exhibit 9 is in words and Figures following, to-wit:

My name is J. T. SMITH. I am a licensed pilot, and have been engaged in that business since 1884 on the Upper Mississippi River. I have been chiefly engaged in piloting raft-boats between the upper waters and St. Louis. The present season I am engaged as pilot on the excursion steamer "J. S.," which is licensed to carry two thousand (2000) passengers. I consider the Hannibal bridge, at Hannibal, Mo., a very dangerous bridge at high water. The river is contracted there to a narrow space, and the water there is very swift. In high water there are whirlpools or boiling water in both draw openings, and you cannot steady the boat. There is more or less danger at that bridge at any stage of water. In smoky weather you often approach the bridge very closely before you can detect the openings. Manifestly, if one of the draw openings were next the shore it would be much safer; for, by following down the shore, you could not miss the opening of the bridge. In approaching a bridge, especially with a tow moving along slowly through the water, you should be *in shape*, as it is called, a long way before you get to a bridge, in order to escape disaster; for, when the current is swift, as at Hannibal, you have no time to make the necessary changes of position should you find yourself out of place. I know the steamer Harry Reed. She is a small boat, of antiquated construction, about seventy-five or eighty feet long, and sixteen to eighteen feet beam. A boat her size would not have the trouble passing this bridge that larger boats would have.

I know that all rivermen feel relieved when they pass and get through the Hannibal bridge. It is the most dangerous bridge on the upper river. I personally remember of the Little Eagle and the Flying Eagle being wrecked while going through the draw on this bridge. I have heard of numerous other

accidents there, but now can not recall the names of the boats. I have used this bridge, this year, with the "J. S.," and am very fearful until I get the boat through the bridge.

J. F. SMITH.

Subscribed and sworn to before me this 8th day of July, 1905, at Keokuk, county of Lee, and State of Iowa.

[NOTARIAL SEAL.]

HAZEN I. SAWYER,

Notary Public.

(Seal stamped as follows:)

[Hazen I. Sawyer, Lee County, Iowa.]

417 STATE OF ILLINOIS,
County of Adams, ss:

I, Capt. A. G. AMES, being first fully sworn upon oath state that I am a Master and licensed pilot. Have run on the Upper Mississippi for about 34 years and am well acquainted with the Hannibal Bridge at Hannibal, Missouri. It has the worst reputation of any bridge on the river. It is the most dangerous Bridge because the river is very broad above the Bridge and at the bridge very narrow and funnel shape. Above an ordinary stage of water the cross current on either side of the piers is very swift, making it almost impossible to control the boat. The very fact of the cross current causes the boat to lose steerage way and the rudder at that point does not have the same effect on the boat as above or below the bridge. I have had the currents catch the rudder and jerk the pilot wheel and tear it out of my hands.

I was once coming up stream with three barges loaded with wood. The boat was the Lizzie Baileys, a tow boat with very good power. She answered her helm perfectly until we were almost out of the upper end of the draw when suddenly she failed to answer the helm and the cross current carried her towards the rest which we just barely missed.

In 1894 I was towing six coal barges drawing 6 ft. with the tow boat Alice Brown, a very large and powerful tow boat. We were afraid to attempt the Bridge. We had passed the Louisiana Bridge with eight barges in tow without any trouble, but did not dare to attempt the Hannibal Bridge and so we cordelled the barges up the Illinois shore.

418 The following boats have been wrecked at this Bridge, the Dictator and Friendship, two of the most powerful tow boats on the River at that time. The Little Eagle, a good sized raft boat. The Flying Eagle, a powerful tow boat converted into an excursion boat. The Mascot, a small tow boat which was afterwards raised.

The Steamer Clinton lost her guards and wheel. Harry Johnson lost part of her guards, barber shop and cook room. There have been several other accidents there which I cannot now recollect and many lives have been lost at that Bridge. I know the Harry Reed which used to be at Hannibal, Missouri. She was a small tow boat about 80 ft. long and 20 ft. beam with dower wheels. She was engaged in local towing at Hannibal. She has two wheels at the stern

and can steer anywhere. The wheels give her unusual means of moving about.

A. G. AMES.

Subscribed and sworn to before me this 17th day of July, A. D., 1905.

BEN HECKLE,

Notary Public.

(Seal stamped as follows:)

[Ben Heckle, Adams Co., Ills., Notary Public.]

419 STATE OF ILLINOIS.

County of Adams, ss:

I, JESSE D. MEFFORD, being first duly sworn upon oath state, that I am a Master and pilot and have been operating steam boats on the Mississippi River for 42 years. Have been a pilot for 23 years and have known the Bridge at Hannibal, Missouri, ever since it was built, over thirty years. I consider it a very dangerous bridge, the most dangerous bridge on the River between St. Louis and St. Paul. I have been through all of these bridges hundreds of times, upon all sizes of boats. The bridge is dangerous because of the cross currents in the draw, with boils and whirls, and in high water the current is very swift and the rudder has no effect on the boat. The boils and whirls throw both ends of the boat first one way and then another and you can't tell where you are going. There is a roll or wave in high water directly in the center of the draw and extending clear from the pivot pier across the draw opening on both sides of the draw. I have run all kinds of boats on the River except center wheel ferry boats and have had trouble with all of them going through the Hannibal draw. Time and again I have been in the draw and would have to drop back and try again. I have seen boats try as many as six times before making it. The floating boom connecting the pivot pier with the draw rests is so close to the water that a boat may get caught on it and may get on top of it. It should have a fence on it. The Ella May going through at night caught on the boom at the lower part and they were a day or two getting her off.

The following boats have been lost there, the Dictator, The

420 Friendship, Little Eagle, and Flying Eagle, all total loss.

The Harry Johnson lost part of her guards and the bake house. The Clinton lost her wheel, bake shop and part of her guards. The Susie Silver, a big side wheel boat, built for excursions and usually running on the lower River went up with an excursion and lost one of her wheels, part of her guards and her wheel house. The Mascot was sunk but afterwards raised. The Old Missouri, a barge was stove in at one end. The War Eagle hit the Bridge and lost part of her wheel and guards. The Gem City hit the bridge and damaged her wheel. A number of other boats and barges have been injured there but I cannot now recall the names. And a large number of rafts have been damaged and broken up on the bridge. The D. C. Fogle hit the bridge with a raft and it cost \$2400.00 for damages. The Tiber hit it with a raft and the raft was torn all to pieces.

If the draw span was moved West so as to make an opening next the shore it would make the draw perfectly safe. You could follow down the boom and as the current sets in towards the shore, you would be held to the boom and then there would not be the boils and whirls there. The boom should be built above the bridge from the shore pier to the shore.

CAPT. J. D. MEFFORD.

Subscribed and sworn to before me this 17th day of July, A. D., 1905.

BEN HECKLE,
Notary Public.

(Seal stamped as follows:)

[Ben Heckle, Notary Public, Adams Co., Ills.]

421 STATE OF ILLINOIS.

County of Adams, ss:

I, EDWARD MEAD of Quincy, Illinois, being first duly sworn upon oath state that I am by profession a steamboat engineer and have been engaged in this business on the Mississippi River since 1868. At the present time I am not working but am on a furlough. I was the engineer of the Flying Eagle which was wrecked at the Hannibal Bridge on June 3rd, 1903. This occurred in the morning about ten o'clock. The Flying Eagle was a strong powerful boat built for heavy towing. At the time of the accident her machinery was in perfect order. I had examined same carefully before the boat was taken out. The strong cross current in the draw caused the boat to take a sheer, throwing her stern upon the floating boom and fouled her wheel and her fan tail was caught upon the boom which was without any fence. She drifted around across the current about parallel with the Bridge, with the barge next to the Bridge. The ropes connecting the barge with the boat never parted but the current was so strong and swift that it capsized the boat. Four lives were lost. The others were able to get off of the boat on to the Bridge by the assistance of the crew and some painters on the Bridge. There were 160 passengers mostly women and children on the boat at that time, the boat having taken out an excursion from Hannibal that morning.

This bridge is extremely dangerous for navigation whenever the stage of water is beyond ten feet, because of the strong cross current,

the boiling water and whirl pools which cause the rudders to fail to control the boat. The boat will stagger one way and

422 another and it is impossible to tell what way she will go. I consider it the most dangerous Bridge on the River. It has hurt the passenger business very much because people will frequently ask if we are going through the Hannibal Bridge and if so, refuse to go on the boat. I was on the Gem City, at one time. She was one of the biggest and fastest side wheel packets ever used on the Upper Mississippi and it took her from late in the afternoon until three o'clock that next morning to get through the draw. One of her shafts was broken and a tow boat was on the crippled side assisting

her. She had the full use of her other shaft, but with this and the tow boat it was almost impossible for her to get through because of the strong current. I have heard of numerous accidents and wrecks on this Bridge.

EDWARD MEAD.

Subscribed and sworn to before me this 17th day of July, A. D., 1905.

BEN HECKLE,
Notary Public.

(Seal stamped as follows:)

[Ben Heckle, Notary Public, Adams Co., Ills.]

423 STATE OF ILLINOIS,
County of Adams;

I, T. S. ADAMS, of Quincy, Illinois, being first duly sworn upon oath state that I reside in Quincy, Illinois, and have resided there for some years. That I knew the steamboat Flying Eagle and owned her at one time. She was lost by being wrecked on the Hannibal Bridge on June 3rd, 1903, at 10 o'clock A. M. She was a boat 30 ft. beam and 139 1/2 feet long. Had a passenger allowance on excursion of 400 passengers and an allowance with barge of 500 passengers. Her boilers were 41 inch shell and 26 ft. long. The engine was 12 inches in diameter and with an eight ft. stroke. She had been built for towing raft boats on the Rock Island Rapids and was considered one of the most powerful and fastest tow boats on the River at that time. When she sunk she had on board 160 people, mostly women and children. I have passed this bridge at Hannibal frequently and have known it ever since it was built. I have had considerable experience in the River business, having owned different boats at different times and having operated the same. The Hannibal Bridge was always considered dangerous, the most dangerous on the River. The cause of this is, that the water in and around the piers and draw rests and between the draws is constantly boiling and eddying and there are cross currents between the draws which, in high water, render it almost impossible to control the boat. The river is very narrow at this point a high bluff on one side and a high levee on the other.

424 Above the Bridge the river is quite broad and at the time of high water it spreads over several miles except where confined by levee. The water is brought together at the narrow point where this Bridge is and therefore makes the current very swift.

T. S. ADAMS.

Subscribed and sworn to before me this 17th day of July, A. D., 1905.

BEN HECKLE,
Notary Public.

(Seal stamped as follows:)

[Ben Heckle, Notary Public, Adams Co., Ills.]

425 STATE OF IOWA,
County of Lee:

My name is WILLIAM MILLS. I am a Master and Pilot with twelve years' experience as such. I have had twenty-nine years' experience on steamboats on the Upper Mississippi River. I am well acquainted with the Hannibal Bridge. I have run it many times with tows of barges and rafts. I do not consider it a safe bridge because of a cross-current, and when the water is high there is a fall in the bridge opening, and when the boat rises on the fall she loses thirty per cent. of her rudder power, and at that time the tow being above the bridge it catches the side draft and makes it difficult to handle your boat. Between the piers of the draw the water eddies and boils, affecting the rudders. The following boats to my recollection hit the bridge: "Dictator," "Clinton," "Little Eagle," "Flying Eagle," "Clarksville Ferry," "Ella May," "Parke," and "Mascot." Some of these were a total loss with loss of life also.

I think the best plan proposed and the only one that would make the Hannibal Bridge reasonably safe is to make a new opening one hundred and sixty feet wide next the Missouri shore and move the draw-span West to cover the new opening. It should have a boom down the shore to slide along. There is not so much current down the shore. I have dropped rafts down there often.

WILLIAM MILLS.

Subscribed and sworn to before me this 15th day of July, 1905, at Keokuk, county of Lee, and State of Iowa.

HAZEN I. SAWYER.

Notary Public.

(Seal stamped as follows:)

Hazen I. Sawyer, Notary Public, Lee County, Iowa.

426 STATE OF IOWA,
County of Lee:

I, L. R. WILLIAMS being first duly sworn upon oath state, that I live in St. Louis, Missouri. That I am a pilot on the packet Du-buque. She is 255 feet long, 275 feet overall, 41 feet beam and six feet hold. My original pilot's license was dated October 12, 1855 and I have been continuously piloting the largest packets since my license was issued, excepting two years. In the course of my business I have run through the Hannibal Bridge and have passed that Bridge many times. The current at that Bridge is the strongest at high water of any place on the River and there is a set of the current towards the shore. I always feel kind of anxious going through the Hannibal Bridge. I remember the following boats were sunk at the Hannibal Bridge. The Friendship, The Little Eagle, the Flying Eagle and barge, and the Dictator. The following I know were damaged, the Clinton, the Centennial. There were several of the large packets that have hit but my memory is not very clear as to which ones. I think the Bridge could be made a great deal safer by having the draw span next to the shore. This

would undoubtedly make it much safer if there was a fence along the shore. It would make no difference how big a tow you had, you could drop down safely and go through.

L. R. WILLIAMS.

Subscribed and sworn to by L. R. Williams before me this 30th day of August, A. D., 1905.

HAZEN I. SAWYER,
Notary Public.

(Seal stamped as follows:)

[Hazen I. Sawyer, Notary Public, Lee County, Iowa.]

427 STATE OF IOWA,
County of Lee:

I, RICHARD EAGELSON, being first duly sworn upon oath state, that I am now pilot of the Steamer Silver Crescent and have been a licensed pilot on the Mississippi River for 15 years and run through the Hannibal Bridge with boats for about thirty years and know the Bridge very thoroughly. I consider it extremely dangerous to boats and rafts. This is so because of the swiftness of the current and the presence of cross currents. The rudder control the boats especially so when there is any wind. In the draws and apparently caused by the rest piers and piers the water is in a constant boil and filled with whirls and the rudder will not work in these. I have known of several boats being sunk by that bridge.

RICHARD EAGELSON.

Subscribed and sworn to before me this 15th day of July, A. D. 1905.

HAZEN I. SAWYER,
Notary Public.

(Seal stamped as follows:)

[Hazen I. Sawyer, Notary Public, Lee County, Iowa.]

428 STATE OF IOWA,
County of Lee:

I, J. H. LAYCOCK, being first duly sworn upon oath state, that I am at present Captain of the Steamer Silver Crescent and am a licensed pilot. I have known the Hannibal Bridge since 1871 and have run that Bridge a great many times. The Bridge is dangerous to navigation especially in high water because of the swiftness of the current and cross current, boiling of the water between the draw, making it impossible for the rudder to control the boat. The smaller the boat the more trouble to hold her steady and get her through safely. The Dictator, the Friendship, Flying Eagle, Little Eagle and others were wrecked at This Bridge..

JOHN H. LAYCOCK.

Subscribed and sworn to before me this 15th day of July, A. D. 1905.

HAZEN I. SAWYER.

Notary Public.

(Seal stamped as follows:)

[Hazen I. Sawyer, Notary Public, Lee County, Iowa.]

429 STATE OF IOWA,
County of Lee, ss:

My name is W. T. CHAMBERS. I am 32 years of age, and my present home is Keokuk, Iowa. From 1886 to 1892 I was employed on McDonald Bros., Knapp, Stout & Co., and other companies' raft-boats. I have been on the raft-boats many times going through the Hannibal Bridge. We used to drop the raft through the shore span on the Missouri side and back the boat over into the draw. At high water, this is a dangerous operation on account of the velocity of the water and the cross-current from the head of the long pier towards the little pier on the West. The crew of the boat always recognized it as a most critical operation, and, while I have been through there at least twenty-five times, I don't remember ever getting through without some sort of an escape. I know that I always got a life-preserver and put it within easy reach. My duties were on the lower deck, running what they call the spool-nigger. I know the rest of the crew felt as I did, for in running an ordinary bridge the crew off watch remained in their bunks; while at the Hannibal Bridge every man was up and dressed and ready for any emergency. I consider the Hannibal Bridge much the most dangerous one on the river, and this conclusion is based on my personal experience on boats towing rafts between St. Paul and Stillwater, Minnesota and St. Louis, Missouri.

W. T. CHAMBERS.

Subscribed and sworn to before me this 15th day of July, 1905, at Keokuk, county of Lee, and State of Iowa.

[NOTARIAL SEAL.]

HAZEN I. SAWYER.

Notary Public.

430 STATE OF IOWA,
County of Lee:

My name is JOHN R. CARPENTER. I am superintendent in charge of dredging operations at the Des Moines Rapids Canal and elsewhere. My duties require me to at times go through the Hannibal Bridge with the dredges belonging to the United States. I consider the Hannibal Bridge a very dangerous obstruction to navigation, especially at high water, owing to the swift current the position of the draw and the absence of any of the usual guide-booms used to facilitate navigation. The current is not only extremely swift in the draw-opening, but there is just in the draw a sort of roll or wave, caused, probably, by the piers, that make it extremely difficult for a boat to get past the pivot pier. In 1903, at a stage of 16 feet, I came up through the Hannibal Bridge with

the United States dredge Phoenix and one dumpboat. I had, as towboat, the most powerful towboat owned by the United States in this part of the river, the Coal Bluff, assisted by the United States dredge-tender Lucia to help steer the tow. When we got into the draw opening, the whole tow came to a stop on the roll I speak of, and we had to full-stroke the two boats to get through. I consider such a current, in such a place, as most dangerous. If the draw opening was made next the Missouri shore, it would be far less dangerous. The current would be less, and the shore would be there to keep the boat straight. The trouble now is that if the boat gets out of place in passing through either of the present openings, one is bound either to swing around and strike one of the piers and sink, or to be carried under one of the spans at either side
431 of the draw and capsized.

JOHN R. CARPENTER.

Subscribed and sworn to before me this 15th day of July, 1908, at Keokuk, county of Lee, and State of Iowa.

HAZEN I. SAWYER,

Notary Public.

(Seal stamped as follows:)

[Hazen I. Sawyer, Notary Public, Lee County, Iowa.]

432 STATE OF IOWA,
County of Lee, ss:

I, B. C. DAVIS of Ft. Madison, Iowa, being first duly sworn upon oath state, that I have had about twelve years' experience on the Mississippi River between St. Louis and St. Paul and know the navigation of said River and am acquainted with the Bridges between St. Louis and St. Paul. I was Clerk and acting mate of the steamboat Little Eagle which was sunk at the Hannibal, Missouri, on April 20th, 1882. This occurred on a Sunday about 2.30 o'clock.

The Little Eagle was a tow boat about 120 feet long and 28 feet wide, with very powerful machinery and fast for her class. We had delivered a little lumber raft above the Bridge for the Hannibal Lumber Company. We went down to Hannibal to get our money. While we were there the Lumber Company wanted the Captain to drop a few cribs of lumber through the Bridge and land it where they could draw it out. The water was very high and they were afraid to drop the lumber. Capt. Dan Davidson who was Captain of the Little Eagle told them that he would do it just to accommodate them. The Captain said he was going to run the draw with the lumber, but said to me to have the men stand by the lines so we could let the boat go in case he thought it best. My wife was with me on the boat. She was in the cabin and when the Captain said to be ready to let the lumber go I saw the danger at once. I ran to the top of the stairs and yelled to my wife to come down on deck at once. She said wait until I get my hat and I told her to wait for nothing.

433 She came down on deck and when the Captain tapped the bell to let go, I told everybody to jump on the lumber. They did this except one man who ran upstairs and in the cabin

and was drowned. The raft was almost even with the West pier in the draw when we let go and just as soon as the larboard guy line was cut loose from the raft the stern of the boat began to swing towards the Missouri shore. The Captain blew the little whistle to back her strong, or whale, it at her, as we term it, but she did not mind her rudders, but kept on swinging around until she was sideways, East and West, with stern toward the Missouri shore. Just above the shore span the Captain saw that she would be lost sure unless he could come ahead on her and get her into the draw. He got her bow just in the draw, the pier caught her about the ash pan, forward of the boilers she careened and the water caught the upper or larboard guard and she turned bottom side up and hung on the pier, and the current tore the cabin into splinters in less time than I can tell it. There was a strong cross current at the time drawing toward the Missouri shore. That in my opinion, is why she did not mind her rudders. Three lives were lost. The other people got onto the raft before the boat cut loose.

From my experience I believe the Hannibal Bridge, because of the powerful current in high water, the whirl pools and boils, to be the most dangerous Bridge on the Mississippi River. If the draw were changed so that there would be a draw span next to the shore and a boom from the shore pier up the River, the passenger boats would be almost perfectly safe because the boat if it became almost unmanageable or failed to answer her rudder could rest on the boom and no damage could be done. She could be held there and would not strike any of the piers or draw rests.

B. C. DAVIS.

Subscribed and sworn to before me on this 21st day of August, A. D., 1905.

CHARLES DOERR,

Notary Public.

(Seal stamped as follows:)

[Charles Doerr, Notary Public, Iowa.]

435 STATE OF IOWA,

County of Lee, ss:

I, CHARLES P. MARTIN, being first duly sworn upon oath state, that I am pilot on the Upper Mississippi River Steamers from St. Louis to St. Paul. I have held a pilot license for twenty-five years and have been most of that time on the large packets plying between St. Louis, Keokuk and Burlington. I make four to six trips a week through the Hannibal Bridge, half up stream and half down. I think I have been through this bridge more times than any other pilot on the river and I believe the Hannibal bridge is the most dangerous bridge I know of on the river. This is on account of the boiling water and cross currents in the draw opening. The current in this draw is the swiftest I know of in any bridge. The draw is far from shore and without any boom protection. The effect of the boils is to make the boat jump about as soon as she gets on them and hard to steer. The set of the current at high water is from the

upper draw rest towards the little pier to the upper end of the draw and on the east side of the draw to the other little pier is not so strong as on the West side. The float between the draw rests and pivot piers causes, in my judgment, most of the boiling. If it was solid to the bottom I think the current would be straighter.

I think it would make the bridge safer if the draw opening was next to the Missouri shore with the boom from the shore pier
436 up stream. I do not know of any other plan as good as this for improving navigation through the bridge. As a pilot I feel more skittish about the Hannibal Bridge than any other bridge on the river and I consider it dangerous to free and safe navigation of the river. To my personal knowledge the following boats were sunk there: The Dictator, Flying Eagle, and the Little Eagle. The following packets were damaged there, the Clinton lost her wheel and guards. The Minneapolis her guards. The Gem City hit and broke her water wheel beam.

CHARLES P. MARTIN.

Subscribed and sworn to be Charles P. Martin before me this 30th day of August, A. D. 1905.

[SEAL.]

HAZEN I. SAWYER,
Notary Public.

437 STATE OF IOWA,
County of Lee, ss:

I, WILLIAM BURKE, being first duly sworn upon oath state that I reside at St. Louis, Missouri. That I am Master of the Mississippi River Steamers. Have always been in the packet business. I am acquainted with the railroad bridge at Hannibal, Missouri. This is the most dangerous bridge on the river. The reason of this is on account of the boils, cross currents and swiftness of the current. In the West draw you have to aim right at the upper draw rest going out from shore. When you get abreast of the draw pier the current still flanks to the right. Coming down stream we use sometime- one side of the draw and sometimes the other, according to the wind. The boils in the draw tend to throw the boat toward the little pier on either side of the draw span. We mostly use the East draw going up because you seem to get out easier and you go easier through the boils. The boils are mostly below the pivot pier and also extend above them. The worst feature about the bridge is responsible for the lives of all the people we carry. We carry sometimes about 700. On ordinary trips we have, besides the crew, from 300 to 350. I always feel relieved when I get through the Hannibal Bridge. I do not feel that way about the other bridges. The danger is so much less. I do not believe there is any pilot who can drop a sidewheel boat through the Hannibal bridge, stern first, during the high water. The
438 only way to run it is to go full speed and take your chances.

I think favorably of the plan to move the whole draw span west and make a new opening next to the shore. The water is very deep under this bridge. I think it is the only place on the river where the water is so deep.

The following boats were sunk on the bridge to my personal knowledge; the Dictator, Friendship, Little Eagle, Flying Eagle and the Mascot. The Clinton and the Centennial were damaged. The latter mashed her head on the little West pier and broke off a piece of the pier which left a mark that is there yet. Other accidents have happened there which I cannot now call to mind.

WM. BURKE.

Subscribed and sworn to before me this 30th day of August, A. D., 1905.

HAZEN I. SAWYER,
Notary Public.

Seal and stamp reads as follows:

[Hazen I. Sawyer, Notarial Seal, Lee County, Iowa.]

439 United States Exhibit No. 10 is in the words and figures following, to-wit:

STATE OF MISSOURI,

County of Marion, ss:

WALTER A. STORRS, on oath says, I have lived in Hannibal Missouri the greater portion of my life. I am engaged in the Coal and Ice business and my office is on the levee very near the river. Each winter we take out large quantities of ice from the river and I have occasion to observe same and the shipping daily. I have seen the Hannibal Bridge innumerable times and have seen numerous boats passing through same. I have heard of quite a number of wrecks or accidents at said bridge and have heard the Bridge discussed frequently by river men and others. At times of high water I do not think the people of Hannibal would patronize an excursion that was to pass through said bridge; this is especially true since the accident to the Flying Eagle in 1903.

I have heard the question of the safety of the bridge as it is now situated, its pivot or turn pier, etc., and its effect on navigation of the river discussed. From such discussions I am of the opinion that any change that could be made that would lessen the danger to navigation at the point where the bridge crosses the river should be made, as there seems to be a general impression prevailing that the bridge is a danger and obstruction to the free use and navigation of the river at this place.

W. A. STORRS.

440 Subscribed and sworn to before me this 23d day of August, A. D. 1906.

[Seal Frederick W. Neeper, Notary Public, Marion Co., Mo.]

FREDERICK W. NEEPER,
Notary Public, Marion County, Mo.

My Commission Expires April 14, 1909.

441 STATE OF MISSOURI,
County of Marion, ss:

C. A. PENNOYER, on oath says, I am at present and have been for the past three years the local agent of the Diamond Jo Line at Hannibal, Missouri. As such agent in the performance of my duties I have been on or near the Mississippi River at this place almost continuously during said time, during the open season.

I have seen almost every boat that has passed through the Hannibal bridge in the last three years. Have had occasion to discuss said bridge with numerous river men, and others. I could see the Flying Eagle when she struck the pier of said bridge, in 1903, on the 2nd day of June.

I can see all boats as they pass through the bridge from the East end of the boat house. A great many have trouble in getting through the bridge and especially so in times of high water. This is not true of other bridges on said river with which I am familiar.

The main current or channel of said river passes through said bridge at an angle, running Southward from the West side of the river across towards the East of Illinois side of same.

From my personal knowledge and from conversations with others and from discussions I have heard among others, it is my opinion that the said bridge as its piers are now located is dangerous and a menace and obstruction to the free use and navigation of said river where it passes through or under the Hannibal Bridge.

442 In my opinion the removal of the turn or pivot one span West would greatly lessen the danger to navigation at that is the natural place for boats to pass through said bridge, the place of least resistance where there is sufficient depth of water. Also that a properly constructed sheer boom would lessen the danger when a boat strikes the pier, has this been done when the Flying Eagle struck the pier I do not think there would have been such great loss of life.

C. A. PENNOYER.

Subscribed and sworn to before me this 19th day of August, 1905.

[Seal Frederick W. Neeper, Notary Public,
Marion County, Mo.]

FREDERICK W. NEEPER,
Notary Public, Marion County, Mo.

My commission Expires April 14, 1909.

443 STATE OF MISSOURI,
County of Marion, ss:

ROBERT A. CURTS, on oath says, I am — years old and have lived in Hannibal, Missouri, the greater part of my life. I have been on the Mississippi River at Hannibal and vicinity a great many times and have seen the Hannibal Bridge more times than I can say or remember.

I have heard river men and others discuss said bridge with reference to its being an obstruction to the free navigation of said river at that point.

I am familiar with the general reputation among the people generally as to its being a safe bridge, as to whether or not a safe passage can be had through same, and especially in times of high water, and in my opinion, judging from such general conversations and discussions of same, the reputation of said bridge for being dangerous, and an obstruction and menace to free navigation of said river, is bad.

ROBT. A. CURTS.

Subscribed and sworn to before me this 18-- day of August, A. D. 1905.

[Seal Frederick W. Neeper, Notary Public,
Marion County, Mo.]

FREDERICK W. NEEPER,
Notary Public, Marion County, Mo.

444 STATE OF MISSOURI,
County of Marion, ss:

SAM. CONRAD, on oath says, I am Fifty Two years old and have been on the Mississippi River all my life. Have lived at and near Hannibal all that time, engaged in fishing on said river the greater portion of my life. I have known the said river at the point where the Hannibal Bridge is situated ever since and long before the bridge was built. Was familiar with the channel and currents of said river at said point before the bridge was built and have been ever since and am now. In my opinion the main current or channel/ has been forced over to the Missouri side just above the bridge since the building of the Government dyke some distance above the bridge. This causes the water in the main current or channel to swerve back towards the Illinois shore just above the bridge with the result that the water passes through or under said bridge at an angle, not parallel with the piers of said bridge.

I believe that if the draw or turn pier of said bridge was moved one span further West or towards the Missouri bank that boats could pass through same with much greater ease, and especially so in times of high water. I also believe from my experience on the river and from my observation of boats in passing through said bridge, that said Hannibal Bridge as its piers are now located is an obstruction and menace to the free use and navigation of said river and is dangerous but that the change above suggested would lessen such danger.

I do not believe the owners of the J. T. Davis, the boat
445 used by the Hannibal Ferry Co. would venture to pass through said bridge at a time of high water.

I witnessed the accident to the Clinton, the Flying Eagle and other boats, and have observed numerous boats at times when they were experiencing great difficulty in getting through said bridge.

S. M. CONRAD.

Subscribed and sworn to before me this 23d day of August, A. D. 1905.

[Seal Frederick W. Neeper, Notary Public,
Marion County, Mo.]

FREDERICK W. NEEPER,
Notary Public, Marion County, Mo.

My Commission Expires April 14, 1909.

446 STATE OF MISSOURI,
County of Marion, ss:

WILL A. DICKASON, on oath says, I am 40 years old and have lived in Hannibal, Missouri and vicinity practically all my life. My father was at one time a Mississippi River pilot and owned several boats and numerous barges at various times. I have been on the river a great deal myself. Own a launch at this time.

I have heard the Hannibal Bridge discussed innumerable times by persons who were in position to know condition of the same and river at that point. I have heard quite a number of accidents at said bridge. Judging from what I have seen and heard in reference to said bridge it is my opinion that the same is a menace to the free navigation of the said river, and more especially at times of high water.

I know both Mr. W. L. Pound and J. C. Shaw of this City. It is my information that they are both railroad engineers in good standing. It is also my information that their river experience has been limited to the navigation of a gasoline, and also a small steam engine, launch for a few years only, and a very few times each year.

WILL A. DICKASON.

Subscribed and sworn to before me this 26th day of August, A. D. 1905.

[Seal Frederick W. Neeper, Notary Public,
Marion County, Mo.]

FREDERICK W. NEEPER,
Notary Public, Marion County, Mo.

My commission Expires April 14, 1909.

447 STATE OF MISSOURI,
County of Marion, ss:

THOMAS C. LIPPENCOTT, on oath says, I have been on the Mississippi River for over Forty years, the greater portion of that time in the capacity of engineer on steam boats. I was familiar with the river at Hannibal before the Hannibal bridge was built; was on a boat that towed piling for the bridge at the time it was being built.

I witnessed the accident that occurred to the Friendship, the Dictator, Little Eagle and the Clinton. I do not think it was extreme high water when all of said boats met with their accidents.

I am acquainted with William T. Williamson, and George T. Morris. I think their experience on the river has been largely confined to the Ferry plying between Hannibal and the Illinois shore just opposite Hannibal. I was employed for a number of years as engineer on this ferry boat and as master for six years. I would not attempt to run this ferry boat through the Hannibal bridge during high water, nor do I think it would be safe to do so.

From my knowledge of the river at the Hannibal Bridge it is my opinion that the said bridge as it is now located is a menace to the free use of the river at that point and is a menace to navigation; any change in the turn pier, or any other part of pier of said bridge that would tend to reduce the danger that now exists to the navigation of the river at said point should be made with as little
448 delay as possible.

In my opinion the Hannibal Bridge is a greater menace to the free navigation of the Mississippi River than any other bridge with which I am familiar. I am not now employed in any capacity on the river nor have been for two years.

T. C. LIPPINCOTT.

Subscribed and sworn to before me this 26th day of August, 1905.

[Seal Frederick W. Neeper, Notary Public, Marion County,
Mo.]

FREDERICK W. NEEPER,
Notary Public, Marion County, Mo.

My Commission Expires April 14, 1909.

449 STATE OF MISSOURI,
County of Marion, ss:

WILLIAM A. MUNGER, on oath says, I have been in the Lime manufacturing business at Hannibal, Missouri, and extensively interested in farming in Pike and Adams Counties, Illinois, and otherwise interested in business in the vicinity of Hannibal, Missouri ever since 1865 and am familiar with the Hannibal Railroad Bridge, and have known the same ever since it was completed in 1871. During a large portion of that time my brother and myself have kept records of high waters of the Mississippi River at this point, owing to our farming and lime interests. I was on the bridge in June of 1903 on the day and at the time when the Flying Eagle struck the bridge and was wrecked, thus being an eye witness to that disaster. I have heard numerous rumors and read newspaper accounts of other disasters that have occurred at this bridge, and it seemed to be the general opinion that the same were caused by the present position of the bridge and its stone draw piers being placed as they are placed.

In my opinion the present position of some — the stone piers of said bridge are so placed as to be constant source- of danger to the free use of the Mississippi River at this place and a detriment to the enjoyment and use of the same by the citizens of Hannibal and

vicinity, and that a change or removal of said piers would tend toward a greater and more extensive use of said river at said point.

WM. A. MUNGER.

450 Subscribed and sworn to before me this 12th day of August, A. D. 1905. My term expires April 14th, 1909.

[Seal Frederick W. Neeper, Notary Public, Marion County, Mo.]

FREDERICK W. NEEPER,
Notary Public, Marion County, Mo.

451 (Cover to this bunch of affidavits bears following endorsements:)

Doc. 10.

Affidavits in Behalf of the Steamboat Men Printed in Full in Doc. 1.

W. A. Storrs *et al.*

Office, Chief of Engineers.

Jan. 15, 1906.

47489/41.

War Department.

Office of the Secretary.

Mar. 3, 1906.

8247/17.

War Department.

452 United States Exhibit No. 11 is in the words and figures following, to-wit:

KEOKUK, IA., *September 11, 1905.*

Major C. S. Riché, Corps of Engineers, U. S. A., Rock Island, Illinois.

SIR: I have the honor to transmit to you to-day, via Adams Express Co., all the papers in the matter of the Hannibal Bridge, together with the abstract of evidence and brief of Messrs. Hughes & Sawyer, Attorneys.

Messrs. Hughes & Sawyer have not only made an argument on the question, but they have investigated much of the evidence given by the bridge Company and they have also secured affidavits from various parties who are in a position to know the facts regarding the Hannibal Bridge, as they considered affidavits more convincing than mere statements, and because the Hannibal Bridge Company have used that form of evidence. Some of these investigations go to discredit a good deal of the evidence in favor of the Hannibal Bridge Company as it stands. There is no question that, outside of the local interests surrounding the Hannibal Bridge, all steamboat men and those best qualified to judge, from General G. K. Warren

in 1878 down, condemn it as a dangerous obstruction to navigation. Making a numerical abstract of the evidence, aside from
453 the petitions presented, the case stands about as follows:

	For the Hannibal Bridge.	Against the Hannibal Bridge.
Civil Engineers.....	2	2
Residents on the River Bank.....	1	7
Pilots and river-men.....	13	39
Employees on Hannibal Bridge.....	4	0
Banker and President Hannibal Bridge Co.....	1	0
Fishermen	1	0
Totals.....	22	47

The preponderance of evidence appears to be overwhelmingly against the bridge, whether we take the numerical count of those giving evidence or whether we consider its quality. For instance, the evidence of Mr. E. L. Corthell, C. E., who built the bridge, and his assistant, both of whom have been living away from the bridge ever since it was completed in 1871, and therefore have had little chance to study it, is contrasted with the evidence of Major A. Mackenzie (now General A. Mackenzie and Chief of Engineers), for fifteen years in charge of this piece of river; General G. K. Warren (a distinguished officer of the Engineer Corps), who made a special investigation in which he unqualifiedly condemned it in 1878; Major Jas. L. Lusk, Corps of Engineers, who had charge of the river and had special opportunity to examine its effect on navigation during the extreme high water of 1903; Mr. M. Meigs, U. S. C. E., for over twenty years occupied in the river improvements of this part of the river and therefore in a position to study it under all conditions.

Of the expert testimony offered by the Bridge Company,
454 not one of the pilots testifying is a man commanding anything but a very small local boat, nor would one of these men be trusted with the navigation of one of the large packets or excursion boats, especially at a high water stage. On the other hand is the whole body of steamboat pilots and owners; men who navigate that bridge daily and under all conditions, and the most expert pilots on the river.

The testimony of fishermen and dwellers on the banks of the river, of course, is of little value in a question of navigation of this kind. They cannot know what kind or what degree of danger the navigation of this bridge entails.

But it seems to me that the most important feature of the investigation developed by the brief of Messrs. Hughes & Sawyer is that relating to the legality of the structure. It seems that up to now the actual measurements of the bridge have been assumed to be in accordance with law, both by General G. K. Warren in his report of 1878, and by Major (now General) A. Mackenzie in his report of 1892. The Bridge Company has made constant claim that the

bridge being built in complete accordance with law, no change in it should be forced upon them. The brief of Messrs. Hughes & Sawyer calls attention to the fact that by the testimony of their own engineer the draw-spans and raft-spans of the bridge are far less in clear width than the law specifically required. The height of the bridge above high water is also less than the law requires. General Warren in his report of 1878 called attention to the lack in clear width of the West raft-span, but apparently failed to measure
 455 the draw-spans. These discrepancies are verified by measurements made by me in the current year and reported on, (see page 42 of Messrs. Hughes & Sawyer's brief). The language of the Act of July 25, 1866, under which the Hannibal Bridge was constructed, was "two draw openings of not less than 160 feet in the clear, and two adjoining spans of 250 feet," and "they should be 10 feet above high water and 30 feet above low water." The meaning of the law seems to me plain: Congress intended the adjoining spans to the draw to be 250 feet in the *clear*. If this was not the meaning, there was nothing to prevent the clear opening from being narrowed to a mere nominal width, and, as the width of an ordinary raft is about 250 feet, it seems evident that Congress intends these wide spans to be made so a raft could get through without taking apart. It has apparently been generally construed that the law was satisfied if the span measured 250 feet in *length*, regardless of the opening under it; but when the construction of the law comes up for argument, it is certainly at least debatable whether Congress did not mean 250 feet clear spans for the passage of rafts.

I have added to the papers and submit with them a set of several snapshots taken from the deck of the steamer Dubuque as she passed through the east draw-span, bound up stream; stage 12.2 feet. These pictures give a good idea of the eddies about the piers, though the definition is not quite as good as desirable. Number 7 shows
 456 quite clearly the nature of the whirls set up by the upper guard pier, one of which appears in the photograph; number 5 shows the great width of the disturbed water alongside the pivot-pier, and it clearly shows the floating structure destitute of guard fences; numbers 10 and 11 give a good idea of the bridge as seen from above. These photographs, in connection with my sketch made June 15, 1905, make the nature of the disturbed water and the dimensions of the eddies very clear.

Very respectfully,

M. MEIGS, U. S. C. E.

Incllosures:

1. List of H. B. papers sent to M. Meigs by Major C. S. Riche.
2. List of papers forwarded by Adams Express Co. today.
3. Adams Express Company's receipt for papers forwarded today

457

"Copy"

UNITED STATES ENGINEER OFFICE,
KEOKUK, IOWA, *July 14, 1905.*

Major C. S. Riche, Corps of Engineers, U. S. A., Rock Island, Illinois.

SIR: I enclose a blue print showing the measurements and observations made at the Hannibal Bridge on June 15 and July 12, 1905.

I found on measuring between the plumb-bobs in contact with the piers at water surface, stage 12.2 feet, except at the West abutment, where the plumb-bob was at the level of the ground, the following clear openings:

West raft-span, clear opening, 240.6 feet. (This is lessened 20 feet at a twelve-foot stage from the fact that the pier sets back from the shore that amount.)

West draw opening, clear opening, 158.3 feet.

East draw-opening, clear opening, 157.3 feet.

East raft-span, clear opening, 240.75 feet.

The piers are of quarry-faced ashlar, very rough, and probably narrower points still could be found. My measurements were made along the South rail of the bridge. The sketch shows the border line between the smooth and the eddying water in the two draw openings. These three eddies unite in troubled water quite a distance below the longer draw-rest. Between the piers and the margins

of the edies, where I have marked them, there is a mass of
458 disturbed water, coming up in boils from the bottom, and with vortexes maybe four or five feet in diameter, and depressed as much as six inches in the center. These start at the sides of the upper corners of the piers and pass under the axis of the bridge, as I observed by measurement, sixty feet on the East side, and fifty-four feet on the West side, measured from the pivot-pier. It is evident that the upper ends of the piers cause the disturbance, by being forced, as it were, at a rate of five miles an hour, and more at high water, through a stream that is forty feet deep at least. It is like a clumsy steamboat of great draft carrying a big suction and weight behind it. The boils, some of them, appear to come up from the depths of the water and burst at the surface, causing a swirling motion. I watched the float below the pivot-pier and the two draw-rests, and the water seemed to ebb and flow to some extent under and around the float. It did not appear to me that carrying the float to the bottom and making it solid would have any particular effect on the current. The pivot-pier and the lower pier are in the wake of the upper pier, and it consequently would not much affect results.

I notice that the float was unprovided with any fence such as is used on all booms above other bridges. A side-wheeled boat wheels would be crushed if she came against it. It ought to have a fence that would catch the guards and save the boat's wheels. As at present arranged, if a boat came against the boom her upper-works would

be in danger of colliding with the iron-work of the draw-span.
459 It is quite evident that a boat going upstream through the draw has only a comparatively narrow space of smooth water

to travel in. Outside of this smooth water, the various eddies and whirls interfere with the action of the rudders, and disturb the steering of the boat.

I refer to General Warren's report on "Bridging the Mississippi River" for description of the bridge, and float observations he made. It looks to me as if floats might have run very nicely there, parallel with the shore before the bridge was built, and the conditions be quite different afterwards by reason of the construction of the piers in deep water.

The bridge is unprovided with any sheer-boom, such as is used on the Quincy, Burlington, Fort Madison and other bridges. I think a float in that place could not be kept in position at high water, owing to the violent current, great depth of water, and large quantities of drift.

If the draw-span was moved West one hundred and sixty feet, and a new draw opening made next the shore, the new opening would be in comparatively smooth water, with much less current at all stages and sufficient water for navigation at the lowest stage. This would involve removing the two hundred and fifty feet shore span and building a pier about ninety feet from shore, with a short span ninety feet long connecting it with the shore. The present East draw opening would have to have a span of about one hundred and sixty feet to complete the communication. The shore span should have a

boom of three or four hundred feet long, to connect it with the shore and sheer boats and rafts into the draw opening. I cannot see any other solution of the problem half as good for the steamboat interests, nor as certain in its results, or equally feasible.

Very respectfully,

M. MEIGS,
U. S. Civil Engineer.

Inclosure.

461

UNITED STATES ENGINEER OFFICE,

KEOKUK, IOWA, *January 16, 1905.*

Major Jas. L. Lusk, Corps of Engineers, U. S. A., Rock Island, Illinois.

SIR: I have the honor to submit the following report concerning the bridge over the Mississippi River at Hannibal, Mo., in accordance with your instructions of the 13th instant.

I am of the opinion that by far the most dangerous obstruction to navigation between St. Louis and St. Paul is the Hannibal bridge. In its history it has cost the loss of many lives, and not less than four steamboats, to my knowledge.

The matter was exhaustively investigated when Major, now General, Mackenzie was in charge of this district, and the best solution, by far, that was offered was the moving of the center of the draw-span about 160 feet west, occupying the site on which the west draw rest pier now stands. The difficulty of doing anything effective with a boom from the shore to the west end of the draw-span is, that the current is so fierce, and the water so deep, at that bridge, and the trouble with drift often so acute, that, to my mind, a boom

would be almost impractical. The proper and only safe way to place the draw is next the shore, so that a boat can slide down the shore in safety, or, in case of accident, land and get out a line. — very high water the current in the draw itself must amount —
 462 eight or nine miles an hour, and a boat passing through, when the current is so swift, is in great danger whether bound up or down. The slightest mistake on the part of the pilot, or any one of a thousand mishaps that are liable to occur to the machinery of a boat which is being crowded to its utmost power in order to get through at all, means irretrievable disaster.

In my opinion, there will, in the future, be an added danger, owing to the contraction by the new levee from South River, within two and one-half miles of the bridge. This new levee reduces the width of the flood channel of the river from a width of four miles, measured at the head of the Sny Levee to the Missouri bluff, to a width of 7,000 feet, between the two levees; and cannot but result in added violence of the current.

I think it would be of advantage to procure the profile and map of the new South River Levee. I understand that they have careful records of the high water line of 1903 between South River and Hannibal. I have tried to get this map and profile, and would perhaps have to send a man to the office of the engineer to make tracings. The cost would be very small—perhaps \$25, for traveling expenses.

I do not think a survey could be made at the present time. The river is gorged with ice, which is unsafe, and the conditions are not different in the vicinity of the bridge, with the exception of the new levee, from what has obtained for the last fifteen years. The
 463 Mississippi River Commission survey, it seems to me, gives

all the data that are necessary to an understanding of the situation. I send, in a separate package, a profile from bluff to bluff, taken from the notes of the Mississippi River Commission map, which is approximate only, but gives a fair idea of the situation.

In my opinion, the accumulation of rip-rap about the piers of the bridge, which I understand *are* added from time to time, makes an additional contraction and thus intensifies the current at the bridge. I made soundings of this not long ago which could be compared with former records, if there are any in your office, to show any changes since 1892.

Very respectfully,

M. MEIGS, U. S. C. E.

(Endorsements on back:)

File Box No. 17.

(10.) 1378/15.

U. S. Eng. Office.

Rec'd Jan. 17, 1905.

Rock Island, Ill.

Keokuk, Ia., Jan. 16, 1905.

Meigs, M., U. S. C. E.

Submits report upon Hannibal Bridge as an obstruction to navigation. States that a survey, if practicable at the present time, would not add to available data, the conditions for the past 15 years having been practically the same as at present except for the construction of the new South River Levee above Hannibal.

464 (Attached to these papers is a blue print of the "Hannibal Bridge, showing observations made June 15th, July 11th, 1905, by M. Meigs, U. S. C. E.," submitted with his report to Col. C. S. Riché, dated July 14, 1905.)

(On outer cover of these papers appear the following endorsements:)

Doc. 11.

3 Reports of Mr. M. Meigs, U. S. C. E., Sept. 11, 1905, July 14 and Jan. 16, with One B. P. Showing How Accidents Happened, Eddies & Boils, &c.

In the Hannibal Br. Case.

Office of the Secretary.

Mar. 3, 1906.

8247/10.

War Department.

Office Chief of Engineers.

Jan. 15, 1906.

47489/33.

War Department.

Inc. 34 (bl. pt.) Attached Hereto.

Noted—Map Files.

465 United States Exhibit No. 12 is in the words and figures following, to-wit:

STATE OF IOWA,

County of Lee, ss:

My name is A. H. CARROLL, I am 37 years old, and I live at Paducah, Kentucky. I am Clerk of the towboat Russell Lord. This is a large towboat engaged in towing ties for the Rock Island Railroad from Paducah, Kentucky, to Keokuk, Iowa. On our last trip our tow consisted of five barges drawing 5 feet of water and carrying 26,000 ties in all. One of the pilots was Ed Cahalan, the other was James Richtman, both experienced Upper Mississippi River pilots. We arrived at Hannibal with the tow on or about April 23, 1906, the stage of water on the Hannibal Bridge being about 14 feet above low water. The current was so swift in the draw of the bridge that it was considered unsafe to attempt to pass it with the tow and we accordingly shoved the tow up as far as we could through the East span of the bridge next to the Illinois shore, where the current is less swift, and the towboat was obliged to go up through the draw,

round-to above the bridge and drop down the Illinois shore to the tow. The boat was then attached to the tow and backed it up to a safe place where we got out lines, fastened the tow to shore and took the boat around to the stern-end of the tow and resumed our voyage as before. The delay amounted to about two and one-half hours.

We came through the Alton bridge in the night without breaking up our tow, and at the Louisiana bridge we also had no difficulty or delay. The Russell Lord is a powerful boat, one of the largest that comes up the Mississippi River above St. Louis.

A. H. CARROLL.

Subscribed and sworn to before me this 5th day of May A. D. 1906.

[Hazen I. Sawyer, Notarial Seal, Lee County, Iowa.]

[SEAL.]

HAZEN I. SAWYER,

Notary Public.

(Following endorsement on back:)

Office of Chief of Engineers.

May 10, 1906.

47489/90.

War Department.

467 United States Exhibit No. 14 is in the words and figures following, to-wit:

Statement of F. A. Delano, President of the Wabash R. R. Co. in the Hearing on the Hannibal Bridge Matter.

I have appeared before you on a summons and as representing the Wabash R. R. Co. The interest of the Wabash Railroad Company is that of a tenant and lessor from the Bridge Company that owns the Bridge. I shall not attempt to make any statement as to the legal aspects of the matter because that will be fully gone into by those competent to discuss it. I wish, however to state in as few words as possible some of the points in this case which are in my estimation entitled to careful consideration.

(1) Any bridge having piers in the river is admittedly some obstruction and some inconvenience to those wishing to use the river. This point was well stated by Mr. Lincoln in 1858, (if my memory serves me) who on appearing as counsel for a company which was proposing to build a bridge at Rock Island, said that it was admitted that a bridge would prove an obstruction to navigation but the question at issue was whether such obstruction was unreasonable. At the time Mr. Lincoln spoke navigation interests on the river were of great importance whereas railroad traffic seeking to cross the river was largely prospective. The only towns of any size in the State of Iowa were at that time the river towns on the Mississippi and Missouri Rivers and yet Mr. Lincoln with the

uncommon foresight which was characteristic of him and in his argument in favor of the bridge said that "the time might
468 come when the traffic east and west across the river might exceed the volume of that up and down the river." Doubtless this prognostication was considered by his hearers as visionary.

(2) The Hannibal Bridge was built under an Act of Congress passed July 25, 1866. The actual location of the bridge was settled and agreed upon in accordance with that Act in 1868, thirty-eight years ago, and the bridge was completed and opened for use as a railroad and (wagon) highway bridge in 1871. In the thirty-eight years which have elapsed since the bridge was begun navigation interests on the river have greatly diminished in importance. On the other hand, for a greater part of the distance between New Orleans and St. Paul there are railroads on both banks of the river able to compete successfully with the navigation interests, although the maintenance of navigation in the river is only made possible by a large annual expenditure on the part of the Federal Government. It is probably safe to say that the importance and value of the traffic and passengers, mails, express and freight across the bridge amount to several thousand times the value of the traffic on the river itself, which for the upper Mississippi River is confined almost exclusively to the rafting of lumber and logs and the carrying of passengers on pleasure excursions during a very short summer season. The proposed change in the bridge while a possible advantage to navigation interests would be a serious burden to the owners of the bridge
469 and indirectly to the very important transportation interests served by the bridge.

(3) It has been shown in the documents already before you that this complaint in regard to the Hannibal Bridge is inspired by certain owners of the Diamond Jo Line. As has been shown this line is practically the only transportation interest the only packet company doing a general business on the river between St. Louis and St. Paul and yet your deponent when General Manager of the Chicago Burlington and Quincy R. R. some three years ago was asked to consider the purchase of this line with all its property, and franchise rights and told that the complete ownership might be had for \$250,000, this included land and buildings at a number of important cities along the river which alone amounted in value to nearly the total figure suggested. The offer was considered by the Railroad Company but discarded. The above is said not at all with any purpose of hurting the interests of the Diamond Jo Co., but as having a bearing on the question of the relative importance of the two highways of traffic.

(4) I have made a careful personal investigation of the merits of this contention, being an engineer by education, I was interested in understanding the engineering problem involved. I recognize that there is room for an honest difference of opinion as to the best location for the draw-span and there seems to have been decided change of heart on the part of engineers having to do with the Mississippi River, as to the best location of the draw-span. The
470 theory now seems to be that it is better to have the draw span openings near one shore or the other, so that the shore side

of the channel may be protected by a suitable "sheer boom" "fence," thus enabling navigators to *feel* their way along if necessary, especially at night. I can readily see that this argument might be a very important one if the principal trouble in going through the bridge was in going down with the current, but in the case of the Hannibal Bridge, I do not understand that that is the case. Because the river is deep and narrow at that point, the current through the main channel is especially swift and of course this is accentuated in times of *high water*. A boat or a log raft is swiftly carried through by the current in the main channel on either one side or the other side of the center or draw-span pier which is directly in the center of the channel as the law provides it should be. Unlike many other bridges on the river, because the river is narrow, the channel deep and rocky and the current swift there has been no shifting of the channel. All the evidence shows that the channel is precisely as it was and where it was thirty-eight years ago. To move the draw-span 160 feet nearer the Missouri shore would bring the channel on the west side of the center pier over the shelving edge of the river bank which in the opinion of many competent to judge would leave only the east channel open for navigation in low water, while in high water, because the west channel would be much more shallow than the east channel would cause a difference in the current passing through these channels which might be much more difficult
 471 for the navigator. Furthermore, it would leave a considerable portion of the deepest part of the channel under a fixed plan which might readily result in carrying a boat down against the bridge in spite of the best efforts of its navigator.

(5) I had occasion last summer to call on Major Meigs of Keokuk, Ia., who has taken a prominent part in this matter. I have a high opinion of Major Meigs' ability as a man and of his desire to be fair, but I can not help feeling that the fact that his sole interests are on the river and in connection with the river, tends to make him over-value the suggestions of the river interests. In conversation with him, he was free to admit that the bridge had been located in accordance with the requirements of the Government, that in the interim the channel of the river had not changed, furthermore that the traffic on the river had greatly diminished, while the traffic over the bridge had greatly increased, but his suggestion seemed to be that for the "*public good*," as a sort of a patriotic act, the railroad company ought to spend the money necessary to make the change and then go to Congress and ask to be re-imbursed. Aside from the moral question of giving away someone else's money to do a patriotic act, it appears to me not unreasonable to suggest that Congress should, in the first place, determine if any change in the draw-span is necessary or desirable, and, if it is to appropriate the amount sufficient to make that change, in the same way
 472 that other monies are appropriated to benefit navigation.

(6) As a matter which is not entirely relevant to the question, but which is of passing interest, it may be proper for me to say:

(a) That the Wabash railroad has never paid a dividend to its stock-holders.

(b) That it has not paid interest to holders of its debenture mortgage bonds.

(c) That for the last fiscal year ending June 30th, 1905 and as shown by its published annual report and its reports to the Interstate Commerce Commission, the road failed by more than \$1,500,000 to earn the interest on its bonds, excluding from this, the interest on the debenture mortgage or any dividends to stock-holders.

(7) It has been shown in previous hearings, and will be fully shown in this, that the real danger to navigation through this bridge exists only during very high water. Leaving out for a moment the question of the duty of a navigator, during such a time to employ special caution, particularly when the lives of passengers only on pleasure bent is concerned, your attention is particularly called and your earnest consideration directed to the building of levees. The Sni Écarté Levee commonly known as the "Sny" Levee was authorized and built long subsequent to the building of this bridge. The fact that it protects a very large area of bottom land from Quincy, Ill. southward from overflow during high stages of water obviously and by the same token contracts the waters of the river into a narrower channel and makes the flow of the water through the bridge and in the channel more swift than it was during similar high stages of water before the building of this levee.

F. A. DELANO.

(Endorsements on back:)

Office of Chief of Engineers.

July 16, 1906.

47489/100.

War Department.

Statement of F. A. Delano.

474 United States Exhibit No. 15 is in the words and figures following, to-wit:

Office of the Hannibal Bridge Co., No. 130 Water Street, New York.

DECEMBER 1st, 1905.

Major C. S. Riché, U. S. Eng. Corps, Rock Island, Illinois.

SIR: In the matter of the inquiry now pending before you, with respect to the bridge over the Mississippi River at Hannibal, Mo., involving the question of whether said bridge is, or is not, as now constructed and maintained, an unreasonable obstruction to the navigation of said River, we beg to say that Mr. George A. Mahan, of Hannibal, Mo., is authorized to represent the undersigned as attorney and counsel in said proceeding.

Respectfully yours,

ALFRED T. WHITE,
Secretary Hannibal Bridge Co.

(Endorsed on back as follows:)

99.

Authority to appear for Hannibal Bridge Co.

475

THE WABASH RAILROAD COMPANY,
LAW DEPARTMENT,
ST. LOUIS, November 28, 1905.

Wells H. Blodgett, Third V. President & Gen'l Counsel.

C. S. Riché, Major, Corps of Engineers, Rock Island, Ill.

DEAR SIR: In the matter of the inquiry now pending before you, with respect to the bridge over the Mississippi River at Hannibal, Missouri, involving the question of whether said bridge is, or is not, as now constructed and maintained, an unreasonable obstruction to the navigation of said river, we beg to say, that Mr. George A. Mahan, of Hannibal, Mo., is authorized to represent the undersigned as attorney and counsel in said proceeding.

THE WABASH RAILROAD COMPANY,
By WELLS H. BLODGETT,
Vice President & General Counsel.

(Endorsements:)

Doc. 15, 100.

Authority to Geo. A. Mahan to represent as Attorney the Wabash Railway Co. and the Hannibal Bridge Co. in the Hannibal Bridge Case.

Authority to appear for Wabash Railroad Co.

Office, Chief of Engineers, Jan. 15, 1906.
47489/43.

War Department.

Office of the Secretary Mar. 3, 1906.
8247/42.

War Department.

476 MONTGOMERY MEIGS, a witness of lawful age, being duly produced, sworn and examined on the part of the Government, testified as follows:

Direct examination.

By The DISTRICT ATTORNEY:

Q. Will you state your name, please?

A. Montgomery Meigs.

Q. Where do you reside?

A. Keokuk, Iowa.

Q. What is your occupation?

A. I have charge of the canal and dry dock, and of the district between Burlington, Iowa, and Hannibal, Mo.

Q. You are in the Government service?

A. Yes, I am in the Government service.

Q. In the War Department?

A. Yes, sir, in the War Department.

Q. I will ask you first if you are acquainted with the contents, the specifications, contained in the notices of the Secretary of War, over the signature of Robert Shaw Oliver, Assistant Secretary of War, to these three defendant companies, to make certain alterations in the Hannibal Bridge?

A. I am.

Q. Were you familiar with that bridge at or about the time of the hearing at Rock Island, on March 16, 1906?

A. Yes, sir.

477 Q. I will ask you, to make it short, what alterations, if any, you observed had been made in that bridge, tending to make it conform to the specifications of that notice?

A. I could not discover any change in it.

Q. You took photographs of this bridge on both those occasions, did you not?

A. I took photographs four years ago and I took some on the 16th of March of this year, for the purpose of comparison, and I could not see any change.

Q. You made a personal inspection of this bridge?

A. Yes, sir.

Q. When did you last see that bridge?

A. Yesterday.

Q. Have there been any changes made in it?

A. Not a particle.

The Government here rests.

MR. MINNIS: We desire to move the Court to direct a verdict, under the information and evidence, of Not Guilty, for the following reasons:

First: The evidence does not show, or tend to show, that the Secretary of War granted to the defendants a hearing, or opportunity to be heard, in relation to the complaint against the bridge in controversy, or the proposed changes therein; but, on the contrary, the evidence affirmatively shows that the only hearing held on said matter was by the Assistant Secretary of War.

478 Second: The evidence does not show, or tend to show, that the Secretary of War determined that said bridge was an unreasonable obstruction to the free navigation of said river, or that he took any action with reference to said bridge, or that he gave or caused to be given to the defendants, or either of them, any notice that required the changing or altering of said bridge, or that he exercised his judgment or discretion in respect to the changes or alterations in said bridge, or performed or caused to be performed any of the acts in said proceeding or with respect to the proposed alterations in said bridge; but, on the contrary the evidence affirma-

tively shows that the only hearing held in said proceeding was held by the Assistant Secretary of War; and that all the notices and other acts with respect to said proceeding, the order, and the proposed changes in said bridge were given, performed or caused to be performed, by the Assistant Secretary of War, who exercised his own discretion in said matter, contrary to law, and the rules and regulations of the Department of War prescribing his duties.

Third: That evidence does not show, or tend to show, that the notice of the Assistant Secretary of War of date March 10, 1906, was served on the defendants or either of them, or that such notice was served on defendants or either of them one year next preceding March 15, 1907, the time in which the bridge was to be altered.

Fourth: That evidence does not show, or tend to show, that the refusal of the defendants or either of them, to alter said bridge, as charged in the information, occurred within the jurisdiction
479 of this court, or that the defendants, or either of them, have committed a misdemeanor, or other offense against the law, within the jurisdiction of this court.

Fifth: The evidence conclusively shows that the Assistant Secretary of War in making such notices of March 10, 1906, mentioned in the Information acted arbitrarily and contrary to law.

Sixth: The evidence affirmatively shows that the notice of date March 10, 1906, signed by the Assistant Secretary of War, involved a misinterpretation of the law, and was made in consequence of an error of law, because the evidence affirmatively shows that the said bridge is not an unreasonable obstruction to the free navigation of said river, within the meaning of the statute.

Seventh: The evidence affirmatively and conclusively shows that the Secretary of War granted a re-hearing in the said proceedings in relation to the proposed changes in said bridge on March 26, 1906, and that said hearing had the effect of annulling the notice made by the Assistant Secretary of War, of date March 10, 1906, and that no notice was issued by anyone after final action was taken in said proceedings, to-wit on July 14th, 1906.

Eighth: The evidence does not show, or tend to show, that the defendants, or either of them, are the Owners or operators of the bridge in controversy, within the meaning of the statute.

The COURT: On the ground assigned by Mr. Minnis, attorney for the defendant, The Wabash Railroad Company, I may ask whether or not it is admitted that one end of this Hannibal Bridge touches the County of Marion in the State of Missouri? If that is not
480 admitted I will permit the District Attorney to prove that such is the case.

NOTE.—It is admitted that the Hannibal Bridge is partly located in the Northern Division of the Eastern Judicial District of Missouri.

The COURT: That being admitted, the motion to direct a verdict of not guilty made by counsel for defendant, The Wabash Railroad Company, is denied.

To which ruling the defendants by their counsel, then and there, at the time, duly excepted.

Mr. MOFFAT: May it be understood that the motion is joined in by the defendant, Hannibal Bridge Company.

The COURT: Yes and the motion is denied.

To which ruling the defendants by their counsel, then and there, at the time, duly excepted.

Mr. HERBAL: If the Court please, the defendant, The Missouri Pacific Railway Company, asks the Court to direct a verdict of Not Guilty in its favor, on both of the counts in the information in this case, for the reasons stated just now by counsel, and the following additional reasons:

It appears from the testimony introduced by the Government that The Missouri Pacific Railway Company was merely a lessee of this bridge under a lease dated January 1, 1883; that in the year 1897, or almost eight years before the acts charged against it here in this information occurred, it sold, transferred and assigned to the Wabash Railroad Company, its co-defendant here, all its right, title and interest in that structure. That it was not in possession of the bridge at the time of the alleged defaults mentioned here, and could
481 not have been guilty of any of the defaults charged against it, at that time. That it assigned its lease, as it lawfully might, and was in no control of the bridge at any time during the period mentioned here, that is from the year 1905 on, and, therefore, we think it is entitled to be discharged.

The COURT: I would like to hear from the District Attorney in reference to the motion made by the defendant, the Missouri Pacific Railway Company, as to the effect of the assignment to the Wabash Railroad Company of its lease. I have not examined those papers.

DISTRICT ATTORNEY: I take it from the evidence, that it has been established that the Hannibal Bridge is owned by the Hannibal Bridge Company, and is being operated today by the Wabash Railroad Company by virtue of this assignment (indicating United States Exhibit No. 2) of the Missouri Pacific Railway Company's interest in this lease of the Hannibal Bridge to the Wabash, St. Louis & Pacific Railroad Company and the Missouri Pacific Railway Company.

As I understand the law to be, an assignment by a lessee before it becomes binding upon a lessor must be with the consent of, or be subsequently ratified by the lessor.

This assignment, which bears date the 31st of December 1897, does not bear upon its face any place the statement that the Hannibal Bridge Company was a party to the assignment which took place between the Missouri Pacific Railway Company and the Wabash Railroad Company.

482 I respectfully submit that both the Wabash, St. Louis & Pacific Railroad Company and the Missouri Pacific Railway Company assumed certain obligations by virtue of the terms of that lease, which obligations not only bind them to the performance of the covenants and contents of this lease, but had this lease, as printed herein, been in force and effect on this date, there could be no question but what the terms of that lease would bind both of these lessee companies to the fulfillment of the full obligation con-

ferred upon them by virtue of the Act of 1899, upon which this criminal proceeding is grounded.

Therefore, unless one or both of them has committed some act in law which relieved them from the full performance of all of their obligations under the terms and covenants of the first lease—that is, if they are yet, either one of them, bounden under the terms of this lease to the fulfillment and performance of any of the covenants herein contained, they are responsible under the terms of the Act of 1899.

The proposition stated in the inverse is, by this private agreement between the two lessee companies, I do not think it would be seriously contended that where the Wabash Railroad Company simply covenants, as it does in this assignment, as follows:

“Said Wabash Railroad Company for and in consideration of the assignment to it by the Missouri Pacific Railway Company of all its rights, powers and privileges under the terms of said lease, does hereby covenant and agree to pay all rental and charges arising under the terms of said lease, and to perform all the covenants thereof and to save the said Missouri Pacific Railway Company free and harmless from all expenses, charges or obligations of any kind, which may at any time arise under or by reason of said lease or the covenants therein contained, and the said Missouri Pacific Railway Company for and in consideration of said covenants and promises of said Wabash Railroad Company, hereinbefore set forth, does hereby assign, transfer and set over to said Wabash Railroad Company the said hereinbefore mentioned lease, and all the rights, title, properties, powers of the Missouri Pacific Railway Company.”

I take it, and respectfully submit, if the Court please, that by the terms of that assignment the Missouri Pacific Railway Company has not even sought to relieve itself of these covenants and obligations of the original lease to pay rental to the Hannibal Bridge Company, and that upon a failure of the Wabash Railroad Company to meet the rental charges of the Hannibal Bridge Company, as it agreed between itself and the Missouri Pacific Railway Company to do, the Missouri Pacific Railway Company is not relieved from its obligation under the terms of the original lease.

The lease on its face does not purport, there is no action on the part of the Hannibal Bridge Company, accepting one of these companies in lieu of the first proposition where they are both bounden by the terms of the lease.

I take it the principles of law are too well settled to take any more time of the Court discussing it. That it takes some overt act on the part of the lessor, such as acceptance or subsequent ratification of one of these companies, whereas they are both bounden by the terms of the first lease.

It is our contention that if it is liable still to the Hannibal Bridge Company for its proportion of the rental as a joint lessee of that bridge, it is liable by virtue of the terms of the Act of 1899.

Mr. HERBEL: My answer to that argument is simply this:

My brother Blodgett is arguing this case on the theory that it is

a civil action. What he says might be good enough reasoning in an action brought between the parties to this lease. But it has no application to a case where we are charged with a criminal offense.

In order to convict the defendant Missouri Pacific Railway Company of an offense here, it must be done under their evidence, through the agency of the Wabash Railroad Company. In other words, you have got to convict us by proxy of a crime, a thing which no court will recognize anywhere.

The lease here simply says we shall have the right to take it from the Hannibal Bridge Company and to operate it. We, in conjunction with the Wabash, St. Louis & Pacific Railway Company (of which the Wabash Railroad Company, the present defendant, is successor) as shown in the deed of assignment here.

Does that impose upon us the obligation of expending all this money to practically rebuild the bridge? What would your Honor think of a contention that because you rented a house from a man and for some reason there was a requirement that that house be built two or three stories higher, or that there shall be several
485 thousand dollars' worth of repairs or renewals required upon it, and that you as the lessee would be required to make them? I say that contention has no foundation at all.

We are charged here with what? With unlawfully obstructing a navigable stream. Now how can we obstruct it if by the evidence they have introduced here, namely the assignment of this lease, which is the only authority we have to do anything to it with the property, we are precluded from going in there and doing anything. we have turned over possession of that property to the Wabash Railroad Company.

Now we have not been in possession, but on the contrary it appears here that the Wabash Railroad Company, being the successor of the Wabash, St. Louis & Pacific Railway Company, and being a joint tenant with us of that property, had possession of it necessarily at the time this assignment was made.

The legal conclusion of the reading of that document is, then, that the Wabash Railroad Company became the sole lessee of that bridge, and that we were precluded by the terms of that assignment from committing any act in reference to that bridge.

Under those circumstances I say we cannot, under any phases of this case be adjudged guilty of having committed the crime which is charged against us here.

We certainly must have physical possession of that bridge
486 first, in order to obstruct the stream; secondly, in order to repair or rebuild it.

Now, suppose we attempted to comply with this order of the Secretary of War, would not our assignee the Wabash Railroad Company have a right to say, "Here, you turned this property over to us and you keep your hands off it. You are done with it."

This is not a question of liability for rental between the Hannibal Bridge Company and the Missouri Pacific Railway Company, it is a question here whether we have by any act of ours violated this law or this order, by refusing to remove that unlawful obstruction which is in the river there.

The time this assignment was made the law said it was a lawful structure. At the time we made this assignment the law said to us, "This is an instrument you have a right to assign." And no objection has been made by the Hannibal Bridge Company to the assignment.

Under those circumstances I think clearly we are entitled to this instruction.

The COURT: I will take the question tentatively under advisement.

I will examine that lease and at the conclusion of the case I will dispose of it.

487 Mr. YOUNG: There are one or two points in response to Mr. Herbel's remarks; I am surprised that the Hannibal Bridge Company does not say "we have no control of that bridge. We have made a ninety-nine year lease. If we go on there we will be taking away the property of our lessee." And the Wabash Railroad Company might say the same thing: "It is not our bridge, it belongs to the Hannibal Bridge Company."

It is the same question as in regard to landlords and tenants, where a nuisance is maintained on land. It has been held that the landlord cannot escape from liability by leasing his land.

Here is an original lease which provides for the payment of rent and the payment of taxes and the maintenance of way and it provides that the parties of the second part shall keep it in every part in good condition, etc.

Those covenants are still binding on the Missouri Pacific Railway Company. The Missouri Pacific Railway Company stands alongside the Hannibal Bridge Company and the Wabash Railroad Company, as operating the bridge. They cannot absolve themselves from liability merely by making a private agreement with the Wabash Railroad Company that the Wabash Railroad Company shall subsequently use the bridge.

The Missouri Pacific Railway Company, of course, is interested to see that the Wabash Railroad Company conforms to the
488 terms of this lease.

The COURT: I will examine the lease and dispose of the matter later.

Mr. HERBEL: The Wabash Railroad Company owns the lease and is strictly within the meaning of the law and we have no control of it.

The COURT: Proceed with the case for the defendants.

489 *Statement for the Defendants, by Mr. Geo. A. Mahan.*

May it please the Court and gentlemen of the Jury:

It is my purpose to give you, briefly, a statement of the facts in this case as the defendants understand them to be.

The defendant railroad corporations do not in any manner own any interest in the Bridge Company.

Both of the railroad companies are Missouri corporations. The Bridge Company also is a Missouri corporation, composed of Citizens of Missouri and other states in the Union.

The Bridge Company was formed as early, I think, as 1866 or 1867 at farthest. It was formed for the purpose of constructing a bridge across the Mississippi river at Hannibal, Missouri. Recognizing that it was a national waterway, it was constructed under an act of Congress passed July 25, 1866 for the express purpose of giving the Bridge Company this authority. In that Act it described the kind of bridge that could be built. One of them was what they call a pier bridge, having a draw span or two draw spans.

It was specified in this Act that the draw spans of the bridge should be placed over the main navigable channel of the river; that being an important question, because it was not the purpose of the Bridge

Company, or the Government, to stop the navigation of the 490 river by steamboats, and especial care was taken about the location of the bridge.

In November, 1866, the Government engineer, one of the ablest and best in the Government service at that time, and one of the best the Government ever has had, came to Hannibal, Missouri, and surveyed the Mississippi river—

DISTRICT ATTORNEY: I don't know whether you will look upon this as being the proper place to make this objection, but to me it appears as proper when the statement is being made to the jury as when the evidence later is offered.

I object to the statement just made by the attorney for the defendant, on the ground that the evidence in support of same would be irrelevant, incompetent and immaterial, under the rule laid down in the Union Bridge case.

The only question to be determined in this case is, whether the formal orders of the War Department were carried out, and the guilt or innocence of the defendants if to be determined on that and that alone.

The COURT: I will hear the statement and rule upon the evidence when it is offered.

Mr. MAHAN (resuming): This accomplished Government Engineer surveyed the Mississippi River above Hannibal and below Hannibal and in front of Hannibal and located the place where the Hannibal Bridge was to be constructed, and the bridge was constructed at the point located by the United States Government.

This bridge was completed in 1871. It is an iron structure 491 on rock piers, stretching entirely across the river.

Now, in order to have a bridge like that constructed, which was just as beneficial to the Government as to the people who put their money in it, one of the reasons and inducements that led the Government to allow the bridging of the river was, that they should use it as a post and mail route, and for the purpose of carrying Government stores, munitions of war and troops across the river. Hence, when built, it became practically a national highway.

Under the terms of the Act, the contract under which the bridge was built, the Government specified that the Bridge Company should transport marching troops across the bridge at the same price that they were charged for marching upon country roads—which is nothing. While citizens were charged for going across the bridge. For

transporting troops on cars, they were permitted to charge only one-tenth of what they charged the ordinary or average citizen. For the transportation of provisions and munitions of war, they were permitted to charge only one-tenth to one-twentieth the average price they charged the citizens of the country.

Now, this bridge was built in conformity with this Act of 1866. When the Act was passed the record will show that rivermen appeared before Congress and fought to a finish every provision of the Act of 1866, making every possible objection that could be
492 made to it and practically the same objections that are made here today.

In the face of those objections the Act of 1866 was passed by Congress. The bridge was finished in 1871.

In 1891 or 1892—1891, I believe—the river men again came before the Government with the same objections they had urged against the passage of this Act of 1866, charging that the bridge was an unreasonable obstruction to navigation, and specifying exactly how it was such unreasonable obstruction.

That the boats were not able to pass through the bridge without striking against the piers; that the draw span should be next to the Missouri shore—and all these specifications that have been read to you by the Government today two or three times.

Now you don't want to forget that most of the rivermen live at Dubuque—

DISTRICT ATTORNEY: I ask that that be stricken out.

The COURT: I may state here that it is immaterial what opposition was made to the Act of 1866, or any other Act, by anybody, in Congress or out of Congress. The jury will be instructed in the end that such opposition to the passage of the Act cuts no figure in determining the question here involved.

Mr. MAHAN: We think it is a part of the history of the case.

The COURT: Go on with your statement, but in the end I
493 will tell the jury that any opposition made to the passage of the Act by Congress should not and cannot influence them in the determination of the question here.

Mr. MAHAN: Very well. We will except to that when the time comes.

In building this bridge they followed the Act of 1866 and put the draw span over the main navigable channel of the river. That was found, gentlemen, by repeated observation of the place where boats plied; the way they went up and down the river, by actual observation of the boats, and by floats, and by sounding the river bottom. The draw span was placed in the center of this main, navigable channel, as required by the Act of 1866, and there was a 250 foot span of the bridge next to the Missouri shore, as required by the Act of 1866.

Now, as I said, objections were filed against this bridge, precisely of the character and kind as filed here, and which are now before you. That was in 1892.

And the Government officer, Major Mackenzie, made just the same recommendation that Major Riche has made in this case, thirteen odd years afterwards.

After those recommendations were made by him the matter came before the then Secretary of War, Mr. Stephen B. Elkins, and after due consideration of these charges he declined to make the change and found that the bridge complied with the Act of 1866.

494 Twelve years after that time, after the finding stood for twelve years—that is, twelve years after that finding of Secretary of War, Stephen B. Elkins, the same charges are made by the same parties, the river-men.

I want to call your attention to this fact: That during the interim between 1892, when Secretary Elkins made his finding, and the second charges preferred in 1905, there has not been a single accident at that bridge wherein there was any injury to a boat or boats of any character or kind, except one accident in 1903, when a boat attempted to pass through the bridge at a period of the highest water ever known in the Mississippi river. And on account solely of insufficient and incapable management of the boat it struck against the piers of the bridge and was sunk. I can go further than that——

DISTRICT ATTORNEY: I object to his going any further than that.

The COURT: I think it is entirely unnecessary.

Mr. MAHAN: I am stating what is in the record.

DISTRICT ATTORNEY: It is not in the record.

The COURT: The Court and the jury and counsel might as well understand right here, that the question here to be tried is, as to whether or not the Secretary of War made the order it is alleged in this information he did make, and whether he made it after evidence had been taken and a hearing had under this section of the
495 Statute. And as to whether one or a dozen boats were sunk at that bridge cuts no figure in this case and will not cut any in the admission of testimony.

I will advise counsel now, it is fair to say, that if the evidence shows that the Secretary of War, acting under this act of 1899, made an order to make these improvements in that bridge, and they were not made, then the Government is not required to go further in the proof than that particular matter.

Now it is no use wasting time about it or taking up time about it. I shall hold in the end that the action of the Secretary of War, based upon the reports of such officers as he saw proper to have make that investigation, cannot be reviewed by this Court.

Now with that understanding of what I am going to declare the law to be, you can make such statement as you see proper to make. I do not want you to argue the question now. I do not propose to be kept here going over unnecessary details about matters with which I think we have no concern.

Mr. MAHAN: Let me say to your Honor that I am not only stating facts which ordinarily, in all fairness and honesty as a lawyer I would be expected to prove to the jury, but I am stating facts which have been affirmatively introduced in evidence by the Government itself and is contained in these documents. (Indicating exhibits offered by the Government.)

496 The COURT: Go on with your statement.

Mr. MAHAN (resuming): Since 1884, this record intro-

duced by the Government will show, that boats have passed through that bridge day and night more than 30,000 times, without injury.

Since 1884, down to 1903, there was this one solitary accident at the Hannibal bridge.

Now I want to call attention to this specific fact: That this great structure was placed at the spot directed by the Government. It was built under the Act of 1866 with a span 250 feet long on the Missouri shore and draw spans 160 feet wide, in the main and navigable channel, as the law required.

Now we are required by the Government, under this order, to remove the 250 foot span, in direct face of the Act which commanded us to put it there. We are commanded by this order of Robert Shaw Oliver, Assistant Secretary of War, to remove the draw span from the main and navigable channel of the river, where it was placed by the Act of Congress, over the main and navigable channel, and move it next to the Missouri shore, and close up one-half of the main and navigable channel of the Mississippi river by a permanent span located so that nobody can pass through it; and put the west span next to the Missouri shore, where there is not now and never was a navigable channel—

DISTRICT ATTORNEY: That is an improper statement.

497 The COURT: You have gone just as far as the Court will permit you after the statement the Court has made in the matter.

I have announced my conclusions, and I will not permit counsel to go in the teeth of what the Court says is matter to be properly excluded from this jury.

Mr. MAHAN: Of course I ask your Honor's pardon. It is not my purpose at all to violate any rule of the Court, but I had supposed it was entirely proper for me to say to the jury that there was no navigable channel next to the Missouri shore, and that to put a span there would be in direct violation of the authority of the Secretary of War, which solely and alone was to remove obstructions and make navigation free and easy.

The COURT: I have stated what the Court concludes about this case, Mr. Mahan, and if this Court is in error, this Act authorizes a direct appeal to the Supreme Court of the United States, where the error of this Court may be corrected.

I have announced, and I reannounce, that so far as this Act of Congress is concerned, it gives to the Secretary of War the right to make these changes in this bridge, if he sees proper to do so. And if he did make such an order, after giving the defendant companies notice of a hearing to be had, and upon the evidence submitted at that hearing he made such an order, the order of the Secretary of War is conclusive upon this Court.

498 This Court is not going to review the question as to whether the Secretary of War made these changes properly or improperly.

Mr. MAHAN: May I suggest to your Honor that the Act says, "lawful order" and the Supreme Court has construed that to mean a "reasonable order."

The COURT: I am not going to consider the question of the reasonable or unreasonable of the order.

I want to be entirely fair with counsel and I want counsel to be entirely fair with the Court.

Mr. MAHAN: I want to be and will be.

The COURT: Under this Act, according to the construction the Court places upon it, The Secretary of War was authorized to investigate the question as to whether this bridge was an obstruction to navigation. It was within his power to give notice of a hearing and to get testimony. If upon that testimony he believed that this bridge in the river obstructed the free navigation of the river, he had a right to direct such alterations in the bridge and to change it as he saw proper, notwithstanding the Act of 1866.

Mr. MAHAN: I agree with your Honor. I do not contend he did not have a right to change it notwithstanding the Act of 1866. I do not think, your Honor, that is involved at all.

But under the Act of 1899, he must make a *lawful* order, 499 and hence a *reasonable* order. And that was the theory upon which I was going to address the jury.

Mr. MOFFAT: I think we can save a good deal of time by understanding the issues here. There are only three:

First, was the order made?

Second, was it served?

Third, was it followed?

The first issue, was the order made, involves one question, which naturally we could not touch upon during the course of the Government's case.

But if we can offer any proof, tending to show that it was an unlawful order, we are privileged to do so in defense of our right as citizens brought before the bar of justice in a criminal case.

And the offer we are going to make in our evidence, in an effort to show the unreasonableness of that order, will be two-fold:

In the first place that the Assistant Secretary of War gave the notice—

The COURT: We have been over that point. Don't go over it again.

Mr. MOFFAT: And it was attempted to exercise a power by the Assistant Secretary of War which would result in defeating its own end.

Now I think your Honor will admit that if we could, if it were feasible—take an exaggerated instance—to introduce evidence that a compliance with this order would make an absolutely wall dammed river, by which no boat could pass, it would be admitted that the order accomplished nothing because it was unreasonable and unlawful.

What we do intend to show in our defense is, that the order which the Assistant Secretary of War made is such as not only to close half the channel, but compel us to excavate a new channel. And there is no authority in the Secretary of War to compel us to do that.

The COURT: I do not propose to go into that question.

Mr. MOFFAT: You do not propose to let us go into it?

The COURT: No. Go on with your statement. I do not propose to let you go into all these things.

You understand my position in this case and if I am wrong it may be corrected.

I shall hold that the order of the Secretary of War, made in this particular case, should have been obeyed. If it could not be obeyed, I am not going to sit here and hear whether it could or could not.

Mr. MINNIS: Will you let us show some authorities upon this question when it comes up?

The COURT: I will let you when it comes up, if it ever comes up.

Mr. MAHAN (resuming). The west span of the bridge, if this order is complied with, will be over a part of the river that
501 boats cannot navigate when the draw span is open. Nothing can be done without excavating and making a new channel, that is, at low water.

The order requires that we put it where there is a channel where boats drawing six feet of water at all stages of the river can pass through the draw span.

There is no trouble about it passing through the East draw span, because that is the old West draw span. That is the one over the main part of the channel.

But under the order, if complied with, boats drawing six feet of water at low water could not pass through or under the West draw span of the bridge.

And if we show you that to be true, then we say that the order of the Assistant Secretary of War is unreasonable and unlawful and we are not required to comply with it, and if that is true we will expect
502 you gentlemen to find a verdict in this case for the defendants.

Mr. MOFFAT: In behalf of the defendant, Hannibal Bridge Company, may I state my conception of the defense which we are entitled to offer, tending to show that the order of March 10, 1906, which is in evidence here, was an unlawful order?

I offer in evidence a certified copy of the Rules of the War Department, (which was offered out of order and marked for identification during the Government's case as Defendants' Exhibit 1,) and in conjunction with that I offer a certified copy of the order of Mr. Secretary Elkins under date of January 17th, 1893, and the report of General Mackenzie upon which it was based.

The purpose in offering the second paper referred to is to show there was a precedent in the War Department, which precluded the Assistant Secretary of War from acting on this matter.

The COURT: The first paper you offer may be read. The second is refused. I don't propose to go into the question of whether Secretary of War Elkins was right or wrong. I propose to confine it to what the present Secretary of War has done.

To which action of the court in refusing to admit the copy of Sec'y Elkins' order, the defendant duly excepted.

Mr. MOFFAT: I ask that the first paper be marked and considered in evidence as "Defendants' Exhibit 1"; and that the second paper be marked "Defendants' Exhibit 2, not read in evidence."

Counsel here reads "Defendants' Exhibit 1."

503 Defendants' Exhibit No. 1 is in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
WAR DEPARTMENT,
WASHINGTON, May 14, 1908.

I hereby certify that the attached is a true copy of the original paper on file in the office of the Secretary of War.

(Signed)

JOHN C. SCOFIELD,
Chief Clerk.

Be it known that John C. Scofield, who signed the foregoing certificate, is the Chief Clerk of the War Department, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof, I have hereinto set my hand, and caused the seal of the War Department to be affixed, on this fourteenth day of May, one thousand nine hundred and eight.

[Seal United States of America, War Office.]

(Signed)

ROBERT SHAW OLIVER,
Acting Secretary of War.

WAR DEPARTMENT,
WASHINGTON, December 30, 1903.

Orders.

The following instructions relating to the methods of business to be employed under the operation of the General Staff system and to the distribution of official business of the War Department and action thereon are hereby published for the information and guidance of all concerned:

All business of the Army coming clearly within the scope and purview of the duties imposed by law upon the General Staff Corps and the Chief of Staff will be submitted by chiefs of bureaus in person or in writing directly to the Chief of Staff, to be acted upon by him in conformity to the regulations duly prescribed for that purpose by the President or the Secretary of War.

The character of the business included in the foregoing description is indicated by the tabular statement showing the organization of the General Staff Corps and the distribution of the subjects with which they are to deal, which is attached to the annual report of the Secretary of War for 1903 as Appendix D.

All cases requiring the action of the Secretary of War or the Assistant Secretary of War not submitted in person by the Chief of Staff will be forwarded direct to the Chief Clerk of the War Department for distribution and action under the orders and instructions of the Secretary of War or the Assistant Secretary of War.

All other business requiring the action of the Secretary of War emanating from bureaus of the Department will be forwarded direct to the Chief Clerk of the War Department for distribution and action under the orders and instructions of the Secretary of War or the Assistant Secretary of War, except such cases as in the judgment of the chief of bureau concerned are of sufficient importance to neces-

sitate personal presentation by him to the Secretary of War or the Assistant Secretary of War.

The Secretary of War reserves for his final action *all cases* involving questions of policy, the establishment or reversal of precedents or matters of special or extraordinary importance arising under the division of jurisdiction hereinafter set forth and the following classes of business:

1. National defense and seacoast fortifications.
2. Board of Ordinance and Fortification and ordinance.
3. Estimates for all appropriations pertaining to the War Department.
4. Appointments, promotions, retirements, courts-martial, and all other important questions relating to officers in the military service.
5. The establishment or abandonment of military posts and other important matters affecting their status.
6. Expenditures from appropriations for contingencies of the Army.
7. The General Orders and amendments to Army Regulations.
8. Military education.
9. Insular affairs.

506 Subject to the foregoing conditions and reservations, the jurisdiction of the Assistant Secretary of War will extend to the following military and civil matters:

1. Recruiting service, discharges, commutation of rations or quarters, courts-martial, and all other questions relating to enlisted men.
2. Clemency for military prisoners.
3. Medals of honor and certificates of merit.
4. Boards of survey.
5. Sales of subsistence and quartermasters' stores to civilians.
6. Expenditures for military posts.
7. Militia.
8. Business arising under the laws pertaining to the navigable waters of the United States.
9. Privileges of occupancy of land under War Department control.
10. Open Market purchases.
11. Battlefield commissions.
12. Calls for information or for papers from the files, and authentication of signatures of bureau chiefs.
13. Miscellaneous claims and accounts.
14. Matters relating to national cemeteries.
15. Inventory and inspection reports.

Under the immediate direction of the Secretary of War and the Assistant Secretary of War, the Chief Clerk of the War Department will have general supervision of the records and correspondence of the Secretary's office and the following classes of business:

1. Receipt, distribution and transmission of the official
507 mail of the office of the Secretary of War and correspondence with individuals on routine matters.
2. Appointments, promotions, and transfers in the civil service and matters affecting the civil force of the War Department, the departments at large, and the military governments.

3. Matters relating to the clerical personnel of the office of the Secretary of War.
4. Army and War Department job printing and advertising business.
5. War Department printing and binding.
6. War Department supplies—
 - a. Requisitions for.
 - b. Routine business, Supply Division.
7. Routine calls for information from the records.
8. Publication of decisions and precedents.
9. Expenditures from appropriations for contingent expenses and stationery for the War Department.
10. All other matters of a purely routine character not involving questions of policy nor establishing precedents, and not requiring the personal action of the Secretary of War or the Assistant Secretary of War under the foregoing assignment.

Signature of Mail.

The Secretary of War will sign, subject to the qualifications hereinafter indicated, letters to heads of Executive Departments, and to the two branches of Congress, commissions, certificates of merit, etc.

The Assistant Secretary of War will sign all requisitions on the Secretary of the Treasury, and letters of the following classes:

1. To committees of Congress, transmitting routine reports without expression of departmental attitude.
2. To heads of Executive Departments, upon subjects coming within the jurisdiction of the Assistant Secretary of War.

All orders or instructions heretofore issued in conflict with 508 the provisions of these orders are hereby revoked.

(Signed)

ELIHU ROOT,
Secretary of War.

V.

509 *Extract from Appendix D to the Annual Report of the Secretary of War for 1903, Showing the Subjects with which the General Staff is to Deal.*

1. Organization, distribution, equipment and armament and training of the Army of the United States in peace and war, including Regulars, Volunteers, and Militia, except as provided in third division.
2. Mobilization and concentration of the land force in time of war.
3. Field maneuvers.
4. Administration and Discipline.—Regulation and orders; drill regulations for cavalry, field artillery and infantry; firing regulations; revision of Articles of War; consideration of legal enactments affecting the military establishment, including revision of estimates for the support of the Army; efficiency records; examination for

appointment and promotion of officers and their details and assignments, exclusive of those belonging to technical staffs and special arms; the consideration of all matters pertaining to special military reward.

Supervision of the War College; general service and staff college; **school of application for cavalry and field artillery**, and post schools; post libraries; civil instructions of learning at which officers of the Army are detailed as military instructors, and all other matters pertaining to military instruction.

5. Transportation and Communication.—Transportation by land and water; organization and administration of railways; wheel and pack transportation; transports and supply ships; regulations for systematic loading and unloading; statistics as to carrying capacity of cars, boats, etc.; methods of embarking and debarking; entraining and detraining, and all other matters in connection with the carrying of troops and supplies; utilization of means of communication; visual and electrical signalling, including field telephone and telegraph systems, cables, balloons and wireless systems.

Posts, camps, depots, hospitals, and quarters, location and character; kind and quantity of quarters; expenditures therefor; water supply, sanitation, and all related matters.

510 6. Supplies, character and quantities of every description for an Army in garrison or in the field.

7. Military Information; collection, arrangement, and publication of historical, statistical, and geographical information; War Department Library; system of war maps, American and foreign; general information regarding foreign armies and fortresses; preparation from official records of analytical and critical histories of important campaigns.

8. Military attachés.

9. Studies of possible theater of war and preparation of plans of campaign, including combined operations of Army and Navy.

10. Organization, distribution, equipment, armament, and training in peace and war of technical staffs and special arms (Engineers, Ordnance, Signal Corps Medical Corps, and the Coast Artillery, including Volunteers and Militia).

11. Manuals for technical staffs and special arms; examinations for appointment and promotion of officers of the same; their details and assignments; supervision of technical schools.

12. Matters pertaining to "Board of Ordnance and Fortification."

13. Permanent Fortifications, so far as relates to position to be fortified, to selection of sites, to amount and character of armament, and to electrical and other appliances.

14. Torpedo systems and other matters pertaining to submarine defense.

15. Combined maneuvers, Army and Navy.

511 Defendants' Exhibit No. 2 is in the words and figures following, to-wit:

UNITED STATES OF AMERICA,

WAR DEPARTMENT.

WASHINGTON, May 13, 1906.

I hereby certify that the attached are true copies of the original papers on file in the office of the Chief of Engineers, United States Army.

(Signed)

A. MACKENZIE,

Brig. Gen., Chief of Engineers, U. S. Army.

Be it known that A. Mackenzie, who signed the foregoing certificate, is the Chief of Engineers, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this 14th day of May, one thousand nine hundred and —.

[Seal United States of America, War Office.]

(Signed)

ROBERT SHAW OLIVER,

Acting Secretary of War.

512

UNITED STATES ENGINEER OFFICE.

ROCK ISLAND, ILL., May 5, 1892.

Brig. Gen. Thomas L. Casey, Chief of Engineers, U. S. Army, Washington, D. C.

GENERAL: A report was submitted by me, under date of February 27, 1892, upon an official hearing, held at St. Louis, Mo., February 16, 1892, under law of September 19, 1890 and instructions of the Secretary of War, to investigate complaints made against the railway and wagon bridge, operated by the Wabash Railroad Company, across the Mississippi River at Hannibal, Missouri. At such hearing it was plainly shown by evidence, that the bridge was a most dangerous obstruction to navigation; that the interests of navigation are entitled to relief; and that the several plans of piers and booms, which have given most excellent results at other bridges on the Upper Mississippi, would not properly overcome the dangers attending the passage of the Hannibal Bridge by steamers, tows, and rafts. It was, therefore, recommended by me, in the report mentioned, that further action under the law, in connection with the plans of the booms, piers, etc., be abandoned, and that the question be taken under consideration of radically changing plan of the bridge so as to make its passage by all classes of navigation comparatively safe and convenient.

At the public hearing in St. Louis, February 16, 1892, there were present: The Vice President, Chief Engineer, and Attorney of
513 the Wabash Railroad Company, which railroad company operate the Hannibal Bridge; the General Superintendent, General Passenger and Freight Agent, and General Agent of the Diamond Jo Line of Steamers; the Presidents, Superintendents, and Secretaries of the Eagle Packet Company and the Cape Girardeau Transportation Company; the President of the Brotherhood of Upper

Mississippi River Pilots; a representative of the St. Louis Pilots' Association; the President and Treasurer of the Joy Lumber Line; and several other owners, masters, and pilots of steamboats and transportation companies. All the representative navigators present expressed their views regarding the character of the obstruction to navigation caused by the Hannibal Bridge, and as to the best plan for overcoming such obstruction. Several written communications were presented, copies of which are appended hereto.

The views held by navigators and expressed at hearing and by communications may be summarised as follows:—

The Hannibal Bridge is a most dangerous obstruction to navigation, and has caused much destruction of property, loss of life, and delay, three large steamers having been destroyed and many other steamers, as well as rafts, having been most seriously injured.

The obstruction to navigation, caused by the Hannibal Bridge, results from the facts, that the bridge was built at a comparatively narrow portion of the river; that the embankment of approach and

514 the Sny Carte Levee so confine the full *dis*-discharge of the river as to make the current at high stages very swift; that the approach to the bridge from above, owing to location of bridge below a sharp bend in river, is most unfavorable, especially for rafts; and that the draw openings are dangerous to approach in high water, being located out in the stream away from the shores.

That, considering the present location of draw, the construction and maintenance of booms and piers, like those used successfully at other bridges on the Upper Mississippi River, would be difficult and expensive; and, while such piers and booms might benefit some classes of navigation, they would not benefit, and would even interfere with, other classes of navigation.

That, assuming the removal of the bridge to a more favorable locality, or a great enlargement of water-way, or an increase in dimension, as well as a change of location, of spans, to be out of the question, the only plan of improvement—which would afford relief to all classes of navigation and render the passage of the bridge comparatively safe and convenient—is to move the draw-span to the west, so as to bring one opening near the Missouri shore, with fences along the shore above and below, along which boats and rafts could drop through safely at all times. In other words, a plan which would bring the Hannibal Bridge in accord with the principles which have been enforced in the case of all bridges lately built over the Upper

Mississippi. It appears that this radical change had always

515 been the plan desired by representative navigators, but that, fearing a radical change could not be brought about, other and less desirable plans had from time to time been partially approved.

To determine fully whether or not the opinions expressed by those appearing at the St. Louis hearing were such as were held by the body of navigators, I addressed, by circular, a printed series of questions to all owners, masters, and pilots of the Upper Mississippi. Of the replies received, over One Hundred express the opinion that the Hannibal Bridge in its present condition is the most dangerous on

the Upper Mississippi, and that the only proper plan of improvement is to move the draw as proposed; perhaps half a dozen of those heard from, do not appreciate the dangers attending a passage of this bridge, or do not consider the change of draw a necessity.

To determine the practicability of the change, I have had a special survey of the locality made and have consulted fully with the Chief Engineer of the Wabash Railroad as to methods of carrying out the work and the probable cost. A tracing is submitted herewith, on which the present location of draw-pier and openings and Missouri shore span are shown in black and the proposed new location of draw span and openings is shown in red. It appears that the change is perfectly practicable; but, owing to great depth of water and the desirability of extending piers down to the rock, the estimates cost of the change is large, being approximately \$150,000.

516 I am personally familiar with the conditions of navigation at the Hannibal bridge and have passed through it many times at all stages of water. I consider that the complaints of navigators are just and that the bridge, in its present condition, is a most dangerous obstruction at high stages of water. I do not believe that, considering present location of draw, any system of booms, piers, or fences can be devised that can be satisfactorily maintained and that will make the passage of the bridge safe and convenient for all classes of navigation. I believe the change in location of the draw, as proposed by the navigators of the river, to be the most practical plan for facilitating navigation through this bridge.

I would prefer the entire removal of the bridge and its relocation in a more favorable locality; but, such an expensive change is probably impracticable.

It would, in my opinion be most desirable, in connection with a change of location of draw, that the opening be increased from 160 feet to 200 feet, as is provided for all recent bridges, and that the current be reduced by removing the Suy Carte Levee embankments, so as to increase water-way; but, such changes would be attended with more expense than conditions justify and so difficult to secure as to make them really impracticable.

While it is a simple matter to present the facts relating to the difficulties experienced by the interests of navigation in passing through the Hannibal Bridge, and to suggest the only plan, 517 which appears to be a practical one, for overcoming these difficulties, it is more difficult to make recommendations as to how such changes of plan can be properly secured.

The Wabash Railroad Company do not own the Hannibal Bridge, but lease and operate it under conditions which would bring upon them the burden of any changes, which, under the law, devolves upon bridge companies. The Wabash Railroad Company make the claim that the Hannibal Bridge was built in exact accordance with the Act of Congress, approved July 25, 1866. That such law compelled the Bridge Company to place the draw-openings out in the stream and construct a raft span between such draw-openings and the Missouri shore; and, that the difficulties which now exist, as result of the location of such draw, are the fault of the law and

not of the bridge company. That the concentration of the river and excessive current at high stages result from the construction of the Sny Carte Levee, for which they are in no way responsible. That the act authorizing the construction of the Hannibal Bridge expressly reserved to Congress the right to require alterations or changes; and that, even conceding the present structure to be an unnecessary obstruction, it is nevertheless, as it stands, a legal structure, but that if changed, even for the betterment of navigation, without the action of Congress, the bridge would be an illegal structure. That the law of September 19, 1890, authorizing the Secretary of War to order alterations in bridges, did not contemplate such a radical alteration as a change of location of draw.

518 The claims that the bridge was built in accordance with the law of July 25, 1866, that the present difficulties are partially at least, due to the requirements of the law, and, that the construction of the Sny Carte Levee is responsible for much of the trouble, are undoubtedly correct. This law of July 25, 1866, did not require an examination or approval, of plans, and, possibly, if such an examination had been required, the location of draw would not have been modified, as the limited experience with bridges on the Upper Mississippi had not, at that early date, demonstrated the necessity of having one draw-opening next or near one shore, whenever possible. As to the claim that, in the case of the Hannibal Bridge, the right to order radical changes is reserved to Congress, I can not express an opinion.

My correspondence and interviews with the officers of the Wabash Railroad would indicate, as is most natural, that the character and extent of the obstructions to navigation at the Hannibal Bridge are not as apparent to them as to the navigators of the river; but, the failure in the past to secure the carrying out of work, in the form of booms, piers, etc., which work has been heretofore under consideration, is, in my opinion, due to an apparent uncertainty in the minds of many navigators as to the favorable results of such work, rather than to fixed opposition to any work on the part of the company. It was most natural that the company should de-

519 sire, in advance of a very large outlay (for piers, booms, etc.), estimated at \$70,000, to be convinced, in advance of doing such work, that it would be acceptable to all classes of navigation, satisfy all demands, and release them from further expenditures in the same direction. I think that the Wabash Railroad Company, while possibly not questioning the right of the Secretary of War, under the law, to require the company to carry out, at their own expense, such class of work as has been required at other bridges, feels that, when it comes to the matter of expending probably \$150,000 for a radical change of the Hannibal Bridge, which was built fully in accordance with the law, the company should not be expected to make such change at their own expense, or, at least, that the expense to them should not be greater than would have been the pier and boom work, required at other bridges and heretofore considered in connection with the Hannibal Bridge.

I have presented all the facts in my knowledge or possession, re-

garding the relation of the Hannibal Bridge to the interests of navigation; but, I can not well make any positive recommendations in the matter further than, that the work desired by the navigators should be carried out, that is: The West draw-rest pier (1st pier from Missouri shore) should be converted into a pivot-pier; a new west draw-rest pier should be constructed near the Missouri shore; the present pivot-pier should be cut down and converted into an east draw-rest pier; the present draw-span should be moved west; 520 new and solid long, or protection piers, of cribwork, should be built above and below the new pivot-pier; and proper guard fences should be built along the Missouri shore above and below the new shore pier. All the changes are shown in the accompanying tracing.

Without having any right to predict the action of the Wabash Railroad Company under any condition, I, nevertheless, feel confident that, if this radical change be ordered by the Secretary of War, under the provisions of the law of September 19, 1890, the matter will be contested by the Company, and the desired work, if ever secured, will at least be materially delayed. If ordered by Congress, under their rights reserved in the act of July 25, 1866 (authorizing the construction of the bridge), there would probably be no grounds upon which a contest could be made.

If it should be deemed proper to present this matter to Congress for its consideration, a question would arise as to whether such work should be required at the sole expense—(probably not less than \$150,000)—of the Wabash Railroad Company, or, in consideration of the fact that the present trouble is, partially at least, due to original law, and construction of Sny Carte Levee, the United States should in consideration of the Wabash Company carrying out the desired work, refund to them such a proportion of the expense as might, by a proper tribunal, be deemed to be equitable and just. If such a division of expense were deemed just, note would necessarily be 521 taken of the fact that, if the change being discussed be carried out, better foundations will be secured for the piers and that a portion, at least, of the work will be in the interests of the company operating the bridge.

There are appended hereto the following papers:—

1. Copy of a letter, dated February 3, 1892, addressed to Major A. Mackenzie, by the Joy Lumber Line, of St. Louis, Mo.
2. Copy of a letter, dated February 4, 1892, addressed to Major A. Mackenzie by Capt. Daniel Davison, of Reads Landing, Minn.
3. Copy of a letter, dated February 10, 1892, addressed to Major A. Mackenzie by Capt. Geo. Winans, President of Upper Mississippi River Pilots' Association, with headquarters at La Crosse, Wis.
4. Copy of a letter, dated February 10, 1892, addressed to Major A. Mackenzie by H. S. Brown, President of Quincy Dredging & Towing Co., of Quincy, Ill.
5. Copy of a letter, dated St. Louis, Mo., February 15, 1892, addressed to Major A. Mackenzie by John Killeen, Superintendent of Diamond Jo Line Steamers.

There are enclosed herewith:—

1. Tracing of a survey at Hannibal Railroad Bridge, Hannibal, Mo., made under the direction of Major A. Mackenzie, Corps of Engineers, U. S. Army, March 29, 1892.

2. Copies of nineteen of the replies received to my circular letter requesting opinions of navigators as to facilitating navigation through Hannibal Bridge. Over one hundred replies of similar import are on file in this office.

Very respectfully,

Your obedient servant,

A. MACKENZIE,
Major, Corps of Engineers.

(2 inclosures.)

WAR DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, January 17, 1893.

It appearing from the within papers that the Hannibal Bridge was constructed in the manner required by the act of Congress authorizing the same; that there have been no serious accidents to boats at this bridge during the past ten or twelve years; that there has been no general demand by the river interests for any change in the bridge, but that there is a difference of opinion among those largely interested in the navigation of the river as to the necessity or utility of the proposed changes; that complaints made of the bridge have been based upon *ex-parte* statements, and that the proposed reconstruction of the bridge would involve a great expense to those owning or operating the same, without positive assurance of permanent advantage to river interests; no order will be made requiring the reconstruction or improvement of such bridge, the same not being an "unreasonable obstruction to the free navigation" of the river.

S. B. ELKINS,
Secretary of War.

Colonel BLODGETT: In 1866 Congress passed an act authorizing and requiring an examination and report to be made of all the bridges over the Mississippi River between Hannibal and St. Louis. Brigadier General W. K. Warren was detailed to perform that duty, and I have here a copy of the report, certified by the War Department as official, and I offer in evidence that part of the report which is descriptive, and which relates to the bridge over the Mississippi River at Hannibal, contained on pages 122 down to the middle of page 125, together with the two maps of the river survey made by General Warren, which are attached to his report as No. 25 and No. 27.

I don't care to read them, but ask that they be considered in evidence; they are a descriptive report of the Hannibal Bridge.

DISTRICT ATTORNEY: I object to the introduction of these papers in evidence for the reason that it is incompetent and immaterial, and apart from what is proper and competent according to the rule already laid down by the Court for this case. And for the further

reason that it is not such a document as can be introduced under the certificate of the War Department; it not being a part of the certificate attached to this book. And for the further reason that there is no evidence at this time in the defense that the conditions of the Mississippi River is the same today as it was in 1866.

Colonel BLODGETT: In 1876.

DISTRICT ATTORNEY: I object to its introduction for the reasons stated.

525 The COURT: I will not stop to pass upon the question of whether it is properly certified, or whether that is in here or not, but shall sustain the objection to the introduction of that testimony. I will allow counsel to put in the Report so as to make up their record.

To which ruling the defendants by their counsel, then and there at the time, duly excepted.

The COURT: I wish to do everything I can to enable counsel to raise all the questions properly to be raised in this record.

Having my own views about the case, and what I shall instruct the jury to do in the matter, I want counsel representing these defendants to have every possible question that is in the case, in this record. Because if I am wrong I want to be corrected, and you want me corrected—and I will be corrected if I am wrong.

The paper referred to is in the words and figures following, to-wit:

526 Defendant's Exhibit 3 is in the words and figures following to-wit:

The Hannibal Railway and Highway Bridge.
(Opened for travel in 1871.)

Authority—This bridge was built in 1871, under act of Congress approved July 25, 1866.

Description of the River and Valley in the Vicinity.

(See diagram 25.)

This bridge crosses the river at a point about one mile above the steamboat landing of Hannibal, Mo., about 17 miles below Quincy. The river at this point is nearly all in one channel, and is very narrow and deep. About one-half mile above, (where the river first strikes the bluff on the right bank) the river bends sharply through an angle exceeding 90° ; the width is only about one-fourth mile, being one of the narrowest points on the river. It was a noted crossing place for the Indians in their day.

The low-water width of the river at the point where the bridge is located is about 1,500 feet. Prior to the building of the Sny Carte Levee, the high water spread out from bluff to bluff 6 $1\frac{1}{2}$ miles, but the levee narrowed the high-water width at this point to about 2,300 feet.

527 The Sny Carte Slough is a small channel *chenal ecarte* which leaves the main river about 4 $1\frac{1}{2}$ miles above this bridge, and joins the river about 33 miles below. This channel was closed and the whole bottom leveed in from the head of the slough

to its outlet. The effect of this was to confine all the flood waters to the main channel causing their greater volume and velocity. This levee gave away April 17, 1876, at 2 p. m., with the water at 19.6 feet on the bridge gauge, and rising. On the morning of the 18th, the reading was 19 feet on this gauge while it had not fallen at Quincy. The rise from low to high water is about 22 feet. The slope as measured by us near low water, is about 0.4 foot per mile.

Surveys.

In November, 1866, we surveyed about 3 miles of river from 1 1/2 miles above to 1 1/2 miles below Hannibal. The low banks were fixed, soundings taken over the whole distance, and the slope measured and observations for volume of discharge made. This was all that could be done until the position for the bridge had been chosen. The water was then about 1.7 feet above low water. The volume was 52,000 cubic feet per second. In October, 1876 (after the bridge was built), we again made surveys and examinations. The water was 6 feet above low water.

Description of the Bridge.

(See diagram 27.)

On the Missouri side the bridge is approached through a short tunnel on a $9\frac{1}{2}^\circ$ curve, to which the bridge axis is tangent. 528 The line of the bridge is at right angles with the general course of the river. The spans of the bridge commencing at the Missouri side are, first one 250 feet from centres of piers; then a draw span 360 feet over all, giving to clear openings of 160 feet; then one span 250 feet and four of 180 feet each, making the total length of the bridge 1580 feet. The line of the bridge is prolonged by an embankment 400 feet from the Illinois end, which is continued by a 6° curve for about 1100 feet. The Toledo, Wabash and Western Railway continues in a southeasterly direction for several miles in the bottom lands of the river.

Another railroad, known as the Chicago, Alton and St. Louis, but lately in the hands of the Chicago, Burlington and Quincy R. R. Co. also uses the bridge. This line leaves the other road 900 feet from the Illinois end of the bridge, and runs to Quincy; it uses the track of the other on the Missouri side of the river.

Substructure: The substructure, commencing at the Missouri abutment, is first an abutment of masonry resting on the rock of the bank, this abutment is about 25 feet from the low water line of the river. The draw or pivot pier is of solid masonry resting on piles. The up and down stream sides are straight lines, $21\frac{1}{2}$ feet long in the direction of the bridge while the sides next the current are arcs of circles. The width of the pivot at right angles to the bridge axis is about 36 feet. The other piers are of solid masonry, upon a grillage resting upon piles. The piles of the two piers next

to the Illinois side were cut off above extreme low water. 529 The stone for these piers was obtained chiefly from the neighboring bluffs, but some came from the quarries near Joliet, Ill.; they are nearly the same form and dimensions as those at Quincy. The guard rests are cribs filled with riprap. The ends next the pivot are formed to receive and hold in place the floats which occupy the space between them and the pivot pier. These floats rise and fall with the river. The part of the embanked approach on the Illinois shore commencing 700 feet from the end of the bridge and leading down the valley for some distance, is used as a part of the *Sny Carte* Levee. At the time of the high water of April 17, 1876, this embankment gave away at a point about 1400 feet below the bridge, this break was about 600 feet wide and scoured out to a depth of 13 feet below the general surface. The Levee gave away on the same day at the head of the "*Sny Carte*."

Superstructure: The superstructure was built by the Detroit Bridge Company. The draw is wrought iron in all its parts. The other spans are all of wrought iron except the top chords, which are cast. The 180 feet spans are 22 feet high and 21 feet wide. The 250 feet spans are 25 feet high. The draw span is 25 feet high at the ends and about 35 feet in the centre. This draw is turned by a steam engine located between the trusses above the roadway. The engine drives a horizontal shaft which drives two vertical shafts (one at each end) that turn the draw. It is claimed by the engineer in charge of this engine, that he can handle the draw with ease, even in time of high winds; that he can, by the aid of a friction brake on the horizontal shaft, stop it in any part of its course; that there has never been a time when a boat could pass the bridge that he has not opened it; and that he has frequently opened it when the 530 wind was so strong that boats would not attempt to run through it. The wagon way is on the same floor and same level as the railway. Vehicles are not allowed to enter the bridge while a train is on any part of it, and a train is not permitted to enter while a vehicle is on it. The bridge has no side-walks.

Influence upon Navigation.

Steamboats.—The draw span is 360 feet over all, and gives two clear openings of 160 feet each; the right openings, being more under the protection of the high bluff and also in line of the channel of the river for some distance above is the most used. The Passage of the bridge by boats at time of low water is attended by but little difficulty or risk, the current, as before stated, is nearly direct for some distance above and below. The Maximum velocity, with the gauge 6 feet above low water, is about 3 miles per hour. At high water, the velocity is so strong that boats of small power cannot stem it. At such time it is a very dangerous obstruction, because the draw is located in the swiftest current needing only a small accident to machinery or a single turn of the wheel too much to cause a serious accident. The case given below of the accident to the *Dictator*, considered one of the most powerful boats on the river shows how great

this danger is. The Dictator, a large tow-boat, with an ice barge in tow, attempted to pass up through the bridge on the morning of the 17th of April 1876. When just through the right draw space the current struck the bow of the barge, which was some distance in advance of the bow of the steamer, (as is the custom in towing there) and swung barge and boat around to the west rest pier and long span. This 250-foot span was carried away, the boat and barge sunk, and nine or ten lives lost. At the time of this accident the gauge on the draw pier indicated 19 feet 6 inches, and at 1 p. m. of that day 19 feet 7 inches. The highest water noted is that of 531 1859, which on this gauge was 22 feet.

Passage of Rafts.—The first span next to the right bank is 250 feet from centres of piers, but the abutment is placed on the bank so far back that the full width of the span is only available at high water. At the time of our examination the shore line was upward of 20 feet, outside of the face of the abutment; and a tangent to the shore line for 1,000 feet above the bridge lay 40 feet outside the face of the abutment; so that the available width between the shore and the first pier was at this stage only 200 feet instead of 240 feet, as it would have been had the abutment been placed on the shore at low water line, then the passage of this bridge by rafts would have been much easier, and its passage by boats not made materially worse. The right draw opening is frequently used by rafts, particularly when towed, because they fear to run close enough to the rocky shore to allow them to use the shore span, and because, by using the draw span they save the trouble of unfastening and re-fastening to the raft. The passage of this draw opening by rafts is attended with difficulty, as it is not wide enough and the current sets toward the right bank. While we were making our observations at this bridge, a raft, being towed by a steamer, in attempting to pass through this span was carried against the west pier, after getting more than half way through. This set of current is caused by the channel crossing to the right bank about 2,000 feet above the bridge. For 1,000 feet above the bridge our observations show that the current is almost parallel with the axes of the piers, but this distance 532 although probably sufficient for boats to straighten themselves in before passing the bridge, is not sufficient for a raft to have its direction completely changed; so the motion toward the right bank continues down as far as the bridge or farther. This set of the current toward the right bank makes the use of the draw by rafts not towed by steamboats almost impossible, and I believe it is seldom attempted.

Alterations to Lessen Obstruction to Navigation.

Sheer Booms.—The Board of Engineers on sheer-booms recommended that a sheer boom be placed along the right bank above the bridge with its upper end attached to the shore, the lower end to be moved to the right rest pier when in position for the passage of rafts through the draw; and to rest against the shore when used for rafts passing through the shore span. The long span to the right of the

draw cannot be made available to its full width without great expense as the shore is high and rocky. The passage of this bridge by boats might be facilitated by the extension of the left rest pier 1,000 feet up stream in the line of the current. This extension should be built up above highest water, to allow boats to land against, and drop or slide through the draw. It could also be used to "warp up" by when the current is too strong. This would not interfere with the passage of the bridge by rafts, as the left 250 feet span is not used by them.

High Bridge.

535 A high bridge at this place would require to be placed 55 feet above high water and 77 feet above low water. The right bank is high so it would require only one long approach. If a high bridge were built at this place it should have high spans over the whole low water river with clear widths of 300 feet, so as to allow boats to use that part of the river in which the current is the most gentle.

(Here follows diagram 25, marked p. 533.)

(Here follows diagram 27, marked p. 534.)

536 Mr. MAHAN: I offer to read to the jury the affidavit of E. L. Corthell, resident engineer, who constructed the Hannibal Bridge, which has been introduced in evidence by the Government, to show that the draw spans of the bridge were placed over the main and navigable channel of the river.

The COURT: Hasn't all that testimony been offered in evidence?

Mr. MAHAN: I want to read it to the jury to show them what it is.

The DISTRICT ATTORNEY: It was offered to show that a hearing was held at Rock Island. Upon the statement in opening of Mr. Mahan, it was said that anything of any consequence in these papers was untrue.

Mr. MAHAN: I did not make any statement about that.

The COURT: What you offer is the testimony of E. L. Corthell?

Mr. MAHAN: The Government has offered the Corthell affidavit in evidence and you accepted it and I now want to read it to the jury.

The COURT: Do you want to read it for the purpose of showing that the Secretary of War had not anything before him, or the official making the examination did not have anything before him?

I don't care what Corthell's opinion of that bridge was. I will frankly state to you, if you asked him whether that was a good or a bad structure, I would not permit him to answer.

Mr. MOFFAT: I think the District Attorney is charging Mr. Mahan with saying what I said. I said none of those papers
537 are evidence of the truth or falsity of their contents. I think in view of that fact, Mr. Mahan should be permitted to offer that affidavit of Corthell's for the purpose of showing that the draw span is over the navigable channel of the river.

That brings it before your Honor if you are going to admit evidence of that fact.

The COURT: On Colonel Blodgett's offer to prove the same thing I refused to permit it. There is no use piling that up.

Mr. MOFFAT: You have not caught the point: That is to show the position of the draw span over the navigable channel of the river.

Your Honor refused this?

The COURT: Of course, I had to.

Mr. MAHAN: You have admitted in once; you can not exclude it now.

The COURT: You want to read that for the purpose of letting the jury understand that that draw span is improper? I say that neither Corthell nor you, in the teeth of the Secretary of War can state that. You might as well understand that.

Mr. MAHAN: I am not engineer enough to pass on that.

The COURT: I want to have this record fair and square and right. I have taken occasion to express the Court's views on that.

Mr. MOFFAT: Whether this paper is marked "For identification," or marked by the date it was sworn to, is sufficient. It will be in the record for that purpose. We wish to offer it now and mark it, and then pass on.

The COURT: But Mr. Mahan insists on reading it to the jury.

538 Mr. MAHAN: No, I do not, in the face of the Court's ruling. To which ruling the defendants, by their counsel, then and there, at the time duly excepted.

Mr. MAHAN: I ask the Court to allow me to read the affidavit of Mr. H. W. Parkhurst, dated July 7, 1905.

The COURT: Mark it as "Parkhurst affidavit dated July 7, 1905, excluded."

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

Mr. MAHAN: I ask to be allowed to read to the jury the affidavit of James Leach, dated July 6, 1905, for the same purpose.

The COURT: Mark it as "Leach affidavit, dated July 6, 1906, excluded."

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

Mr. MAHAN: I offer to read the affidavit of A. O. Cunningham, dated October 26, 1905, for the same purpose.

The COURT: Mark it "Cunningham affidavit, dated October 26, 1905, excluded."

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

Mr. MAHAN: I offer to read the affidavit of Edward Shelah, dated October 26, 1905, for the same purpose.

The COURT: Mark it "Shelah affidavit, dated October 26, 1905, excluded."

To which ruling the defendants, by their counsel, then and there, at the time, duly excepted.

539 Mr. MAHAN: I offer to read to the jury the affidavit of

Mr. George E. Francisco, dated December 6, 1905, to show the number of boats that safely passed through the bridge.

The COURT: Mark it "Francisco affidavit, dated December 6, 1905, excluded."

To which ruling the defendants by their counsel, then and there, at the time, duly excepted.

Mr. MAHAN: To shorten the matter, we are offering to read what is called the Document 6, being the affidavit of divers different people, showing the same thing practically as that shown in the affidavits of Corthell, etc.

The COURT: Were these papers submitted and heard by the officials making the examination at Rock Island, read in evidence there?

Mr. MAHAN: They were taken before different Notaries and sent to that official there.

The COURT: I will make the same ruling in reference to all these papers you have there. At the same time the District Attorney, if you see proper to fill up this record——

DISTRICT ATTORNEY: Provided they make the offer for the same purpose, of these same papers, they may take all or any part of these papers and tender them in evidence for the purpose they have named.

Mr. MAHAN: All these affidavits we have offered go to show that the order of the Assistant Secretary of War is unreasonable and unlawful. Of course it goes to that effect, and is offered for that purpose. We want to make a full record for the court.

540 The COURT: I am perfectly willing you should do so.
The District Attorney offered them and stated he would not stop to read them.

DISTRICT ATTORNEY: I offered it for the sole purpose of showing there was evidence taken there.

The COURT: It is perfectly competent to offer the whole of this evidence and show what was heard there.

Mr. MAHAN: We are offering it for the purpose of showing that the bridge was properly located and that a change would affect navigation and——

The COURT: You may offer any you please, and I will exclude it.

I will direct the District Attorney to offer all testimony taken before that officer at that time, and which became a part of that record. So if the Supreme Court will review for the purpose of finding out whether the Secretary of War was acting illegally they may have the benefit of all that testimony.

Mr. MAHAN: It is all here, and that is all we wish.

The COURT: Let all those papers in connection with that evidence go into the record.

Mr. MAHAN: But you do not allow us to read it to this jury?

The COURT: Not for the purpose of showing you had a lawful structure.

Mr. MAHAN: For the purpose of showing that the order is unlawful and the order is unreasonable.

541 The COURT: I understand that is what you are doing.

The papers may go into the record, but you will not be permitted to read them to the jury.

To which ruling the defendants by their counsel, then and there, at the time, duly excepted.

The affidavits referred to by counsel for defendants are in the record as

United States Exhibit 6 at page 342.

United States Exhibit 8 at page 368.

542 ANDREW O. CUNNINGHAM, a witness of lawful age, being duly produced, sworn and examined, on the part of the defendants, testified as follows:

Direct examination.

By Mr. MOFFAT:

Q. What is your full name?

A. Andrew O. Cunningham.

Q. What is your business?

A. Chief Engineer of the Wabash Railroad Company.

Q. Are you familiar with the Hannibal Bridge?

A. I am.

Q. Have you made any sounding or examination of the location between the west rest pier for the draw-span and the shore?

A. Yes, sir.

Q. Can you testify of your own knowledge as to the depth of

water between the west rest pier of the draw-span and the Missouri shore?

A. Yes, sir.

Q. Please state what is the depth of water at different points, locating them, so far as you can, between the west rest pier of the draw-span and the Missouri shore.

Objected to by counsel for the Government for the reasons stated before.

543 The COURT: The objection is sustained.

To which ruling of the Court the defendants by their counsel then and there, at the time, duly excepted.

Q. Did you make a map of your examination there?

A. I did.

Q. Will you look at the paper I show you and state whether that is a blue-print of the map you made?

A. Yes, sir.

Mr. MOFFAT: I will have the paper referred to marked for identification "Defendants' Exhibit 5."

The paper is so marked.

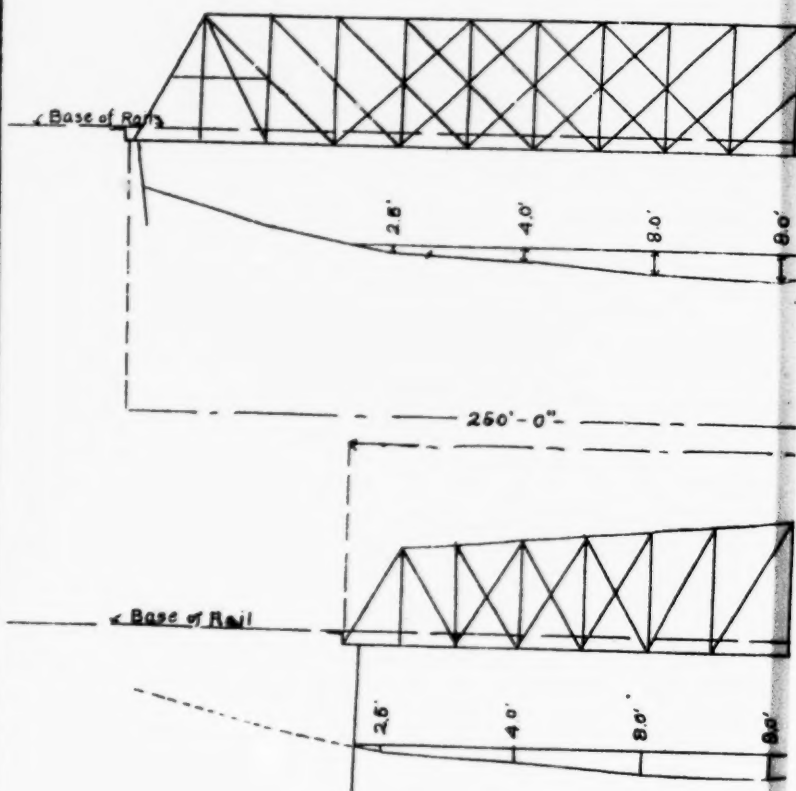
Mr. MOFFAT: I will now offer in evidence "Defendants' Exhibit 5."

DISTRICT ATTORNEY: We object to the introduction of this map, for the reasons heretofore stated.

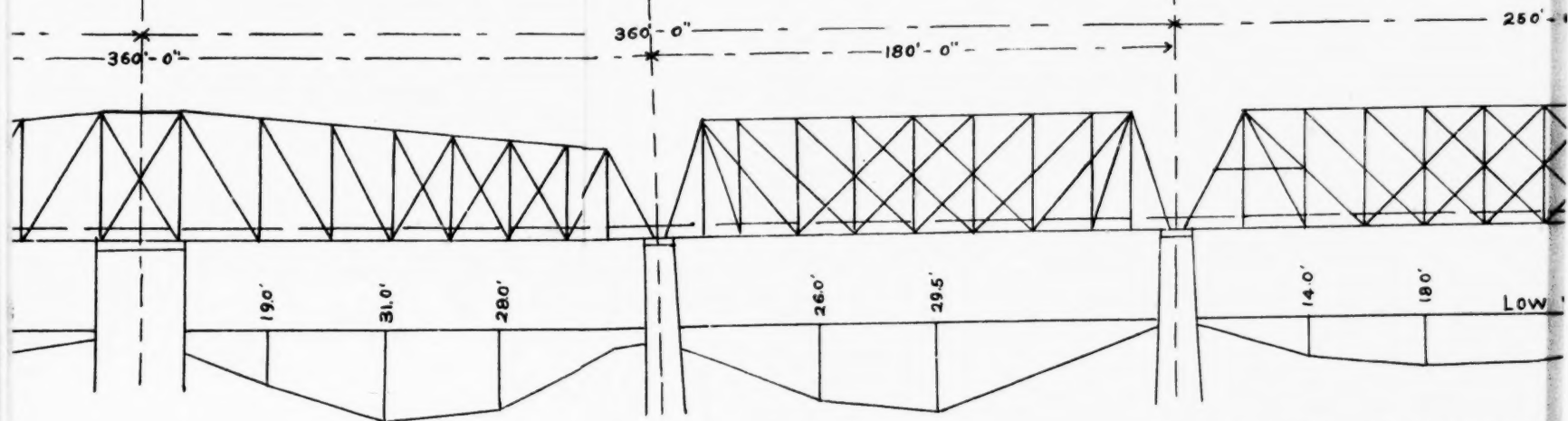
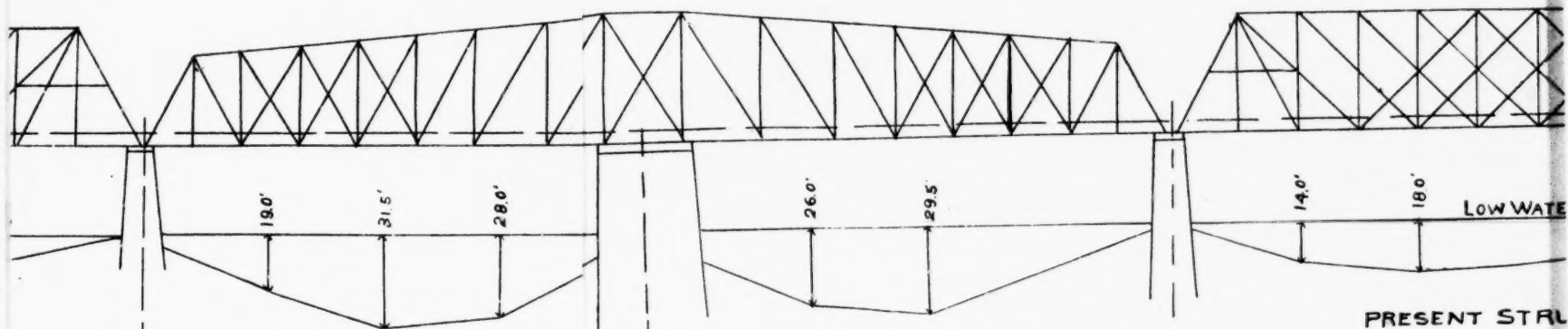
The COURT: The objection is sustained.

To which ruling of the Court the defendants by their counsel, then and there, at the time, duly excepted.

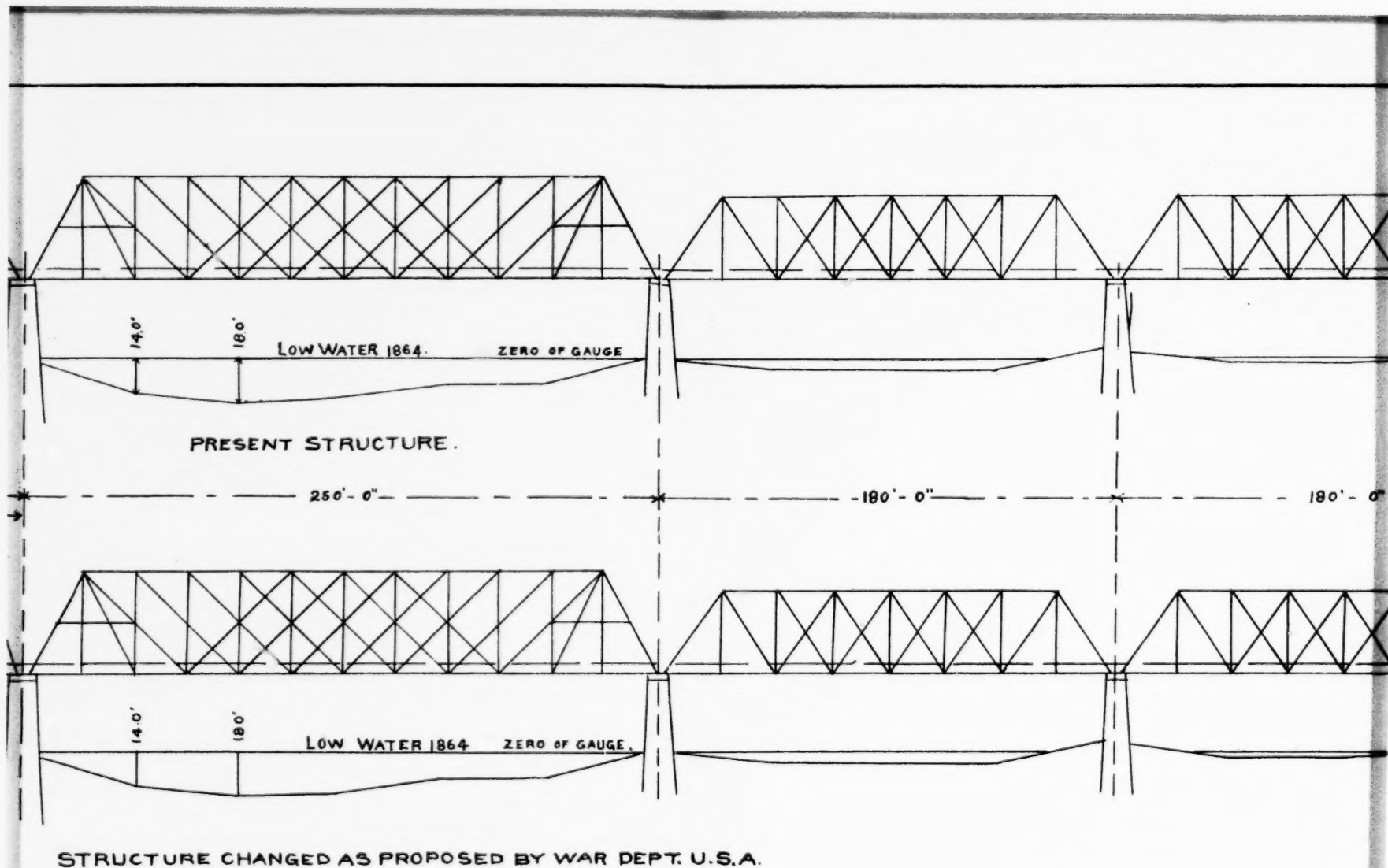
(Here follows map, Exhibit No. 5, marked p. 544.)

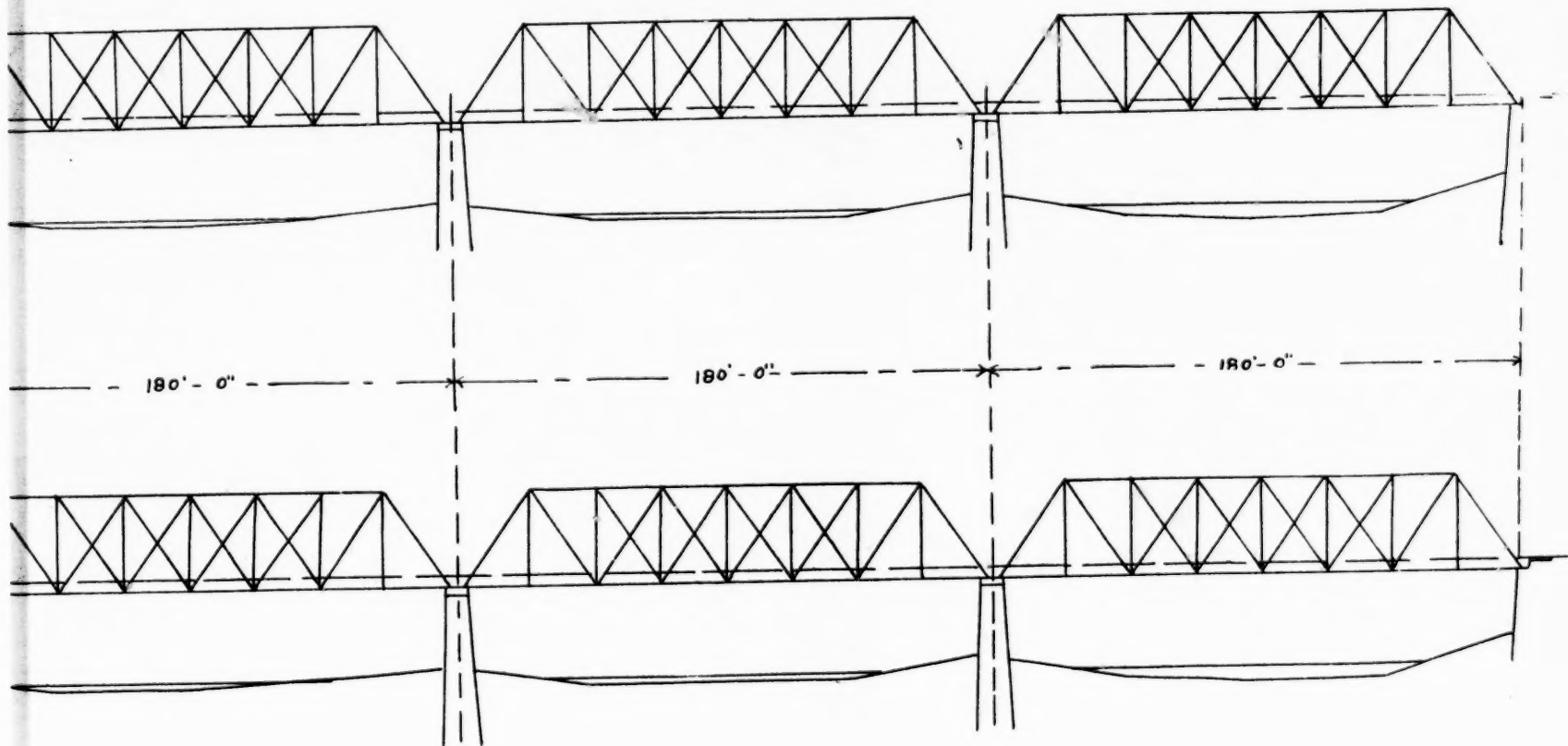


No 294
 Hannibal Bridge Co. } p 546
 +
 United States



STRUCTURE CHANGED A



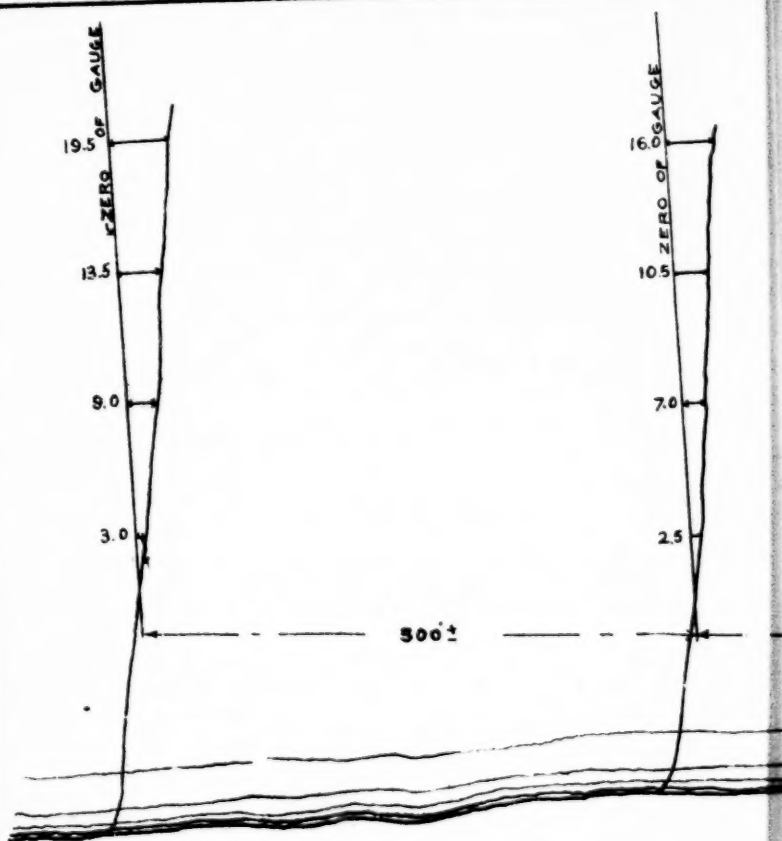


NOTE

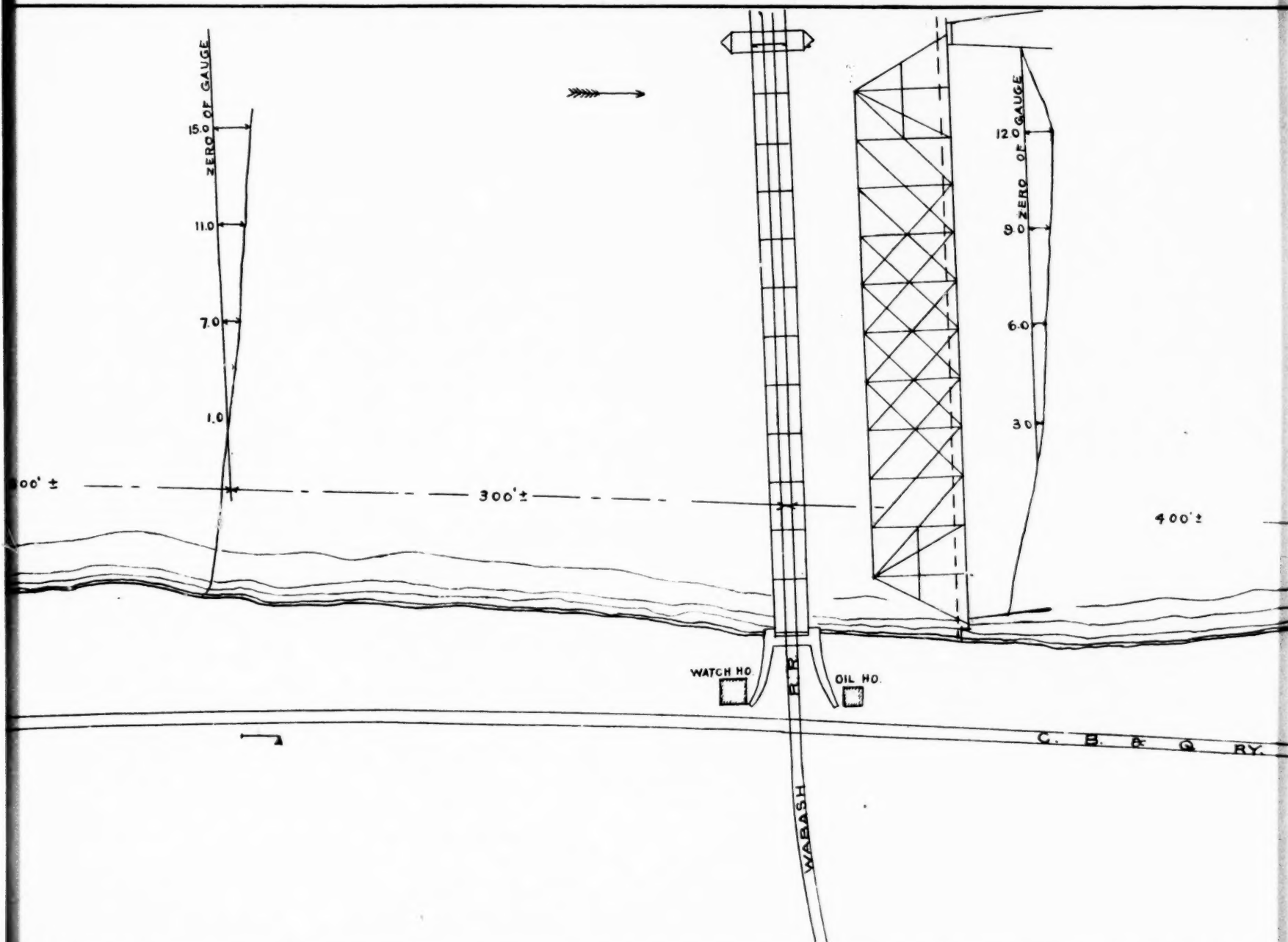
Soundings of River bed taken from
Blue Print of Map made in U. S. Engineer
Office, Rock Island, Ills. dated Feb. 1.-1906.
signed by Jas. L. Lusk, Major of Engineers, U.S.A.

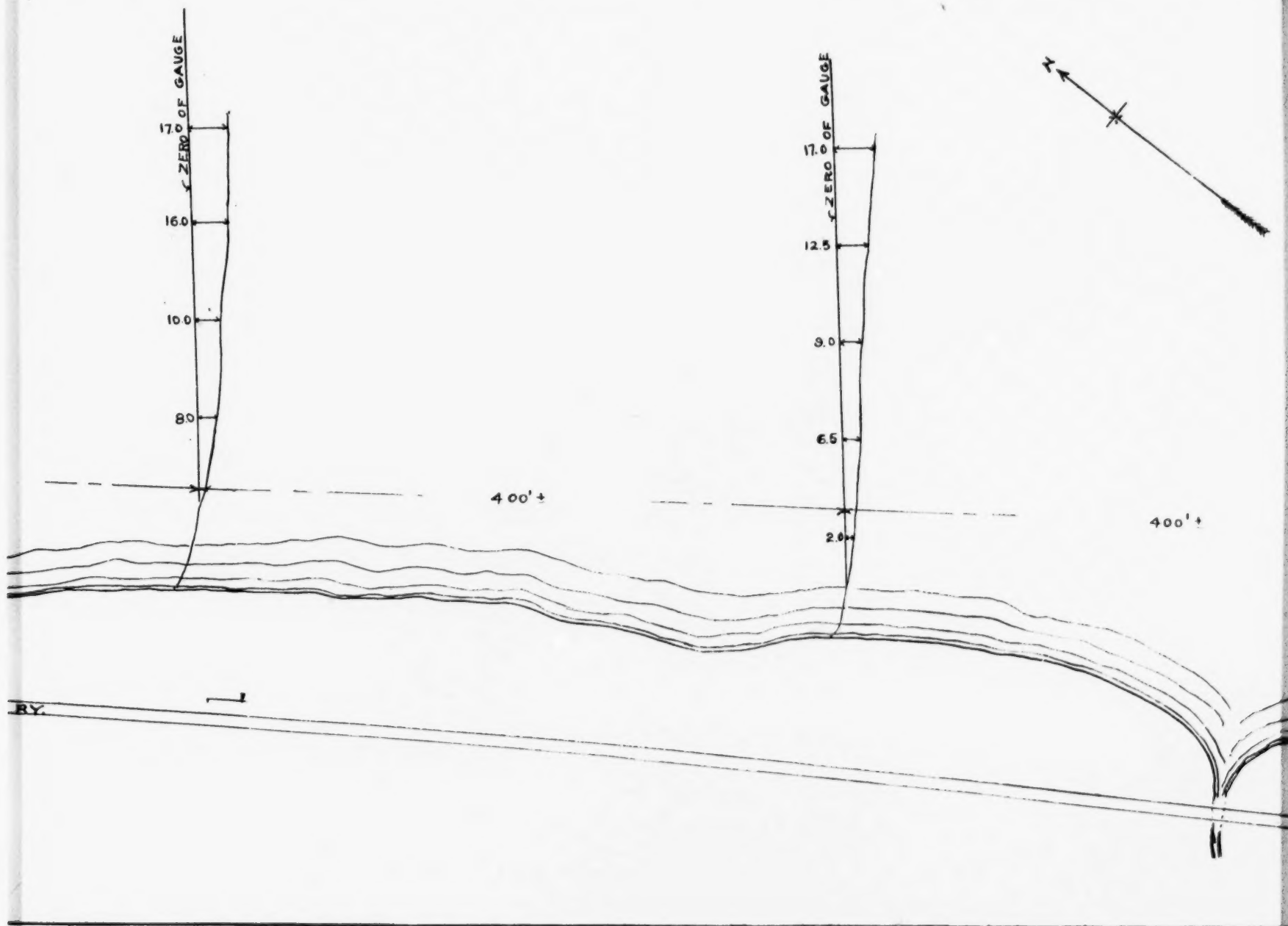
WABASH R.R. SPRINGFIELD DIV.
BRIDGE OVER MISSISSIPPI RIVER.
AT HANNIBAL, MO.

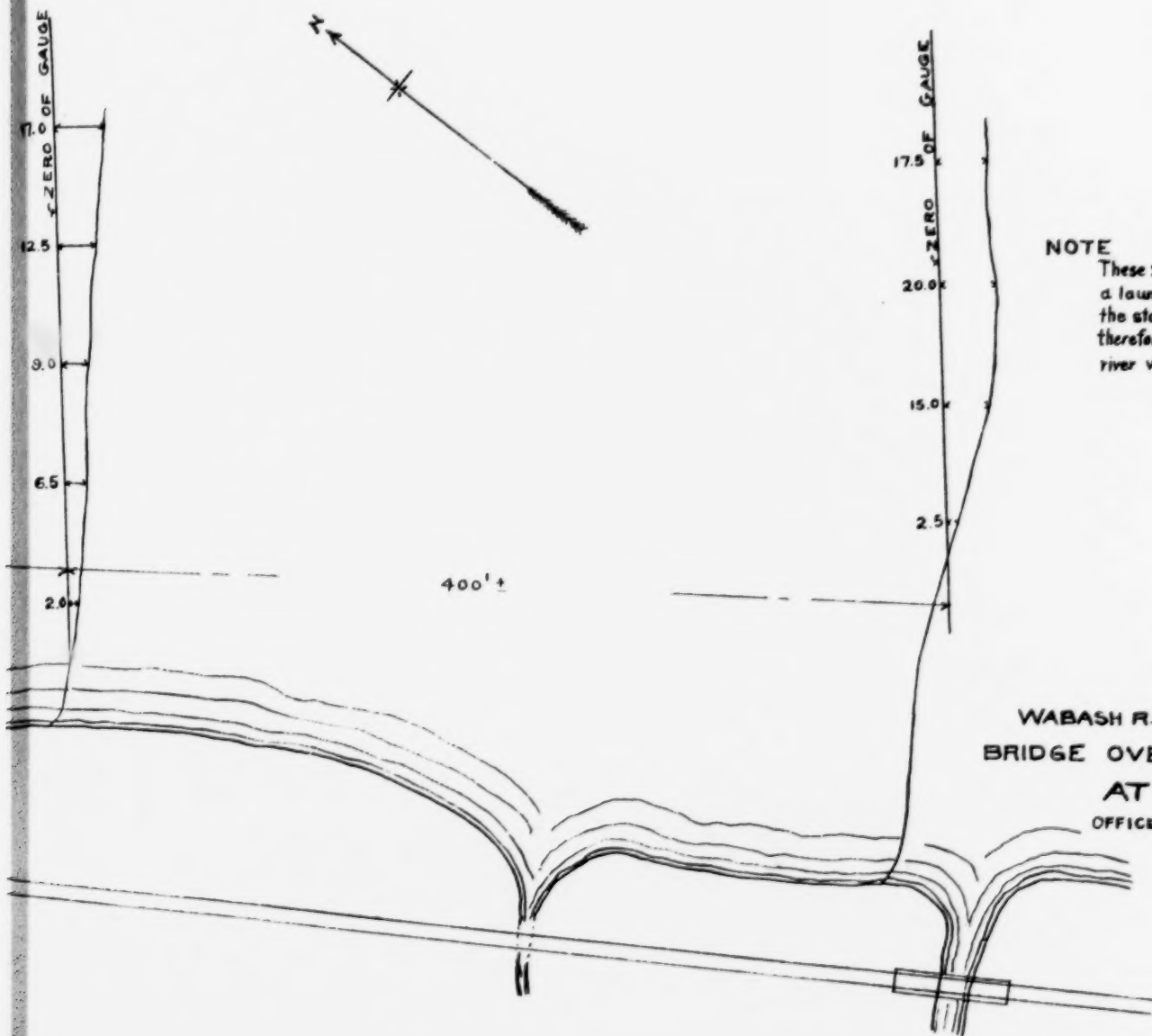
OFFICE OF THE CHIEF ENGINEER.
SCALE, 40 FT. TO 1 IN. APRIL-30-08.



No. 294.
Hannibal Ridge Co. Rd } p. 544
United States.







NOTE

These Soundings were made May-15-1908 from a launch with 100lbs. weight attached to a line, the stage of water was 13ft. above the zero of gauge therefore in all probability, since the current in the river was very strong, they are 1 to 4 ft too deep.

WABASH R.R. SPRINGFIELD DIV.
BRIDGE OVER MISSISSIPPI RIVER.
AT HANNIBAL, MO.

OFFICE OF THE CHIEF ENGINEER

MAY - 18 - 09

Q. Did you prepare a map showing what the soundings would be under the draw-span of the bridge if reconstructed in accordance with the order dated March 10, 1906?

A. Yes, sir.

545 Q. Does the lower plan on the blue-print I now show you accurately represent the soundings taken by you and indicated on the map to which you last testified?

A. (After examining blue-print.) These soundings are the soundings made by the Government, as shown by the Government's map.

Q. On the upper one indicated on this blue-print, you mean?

A. (After examining blue-print.) Both of these are soundings as given by the Government map, as made in Rock Island by the Government's engineers and signed by Joseph L. Lusk, Major of Engineers, U. S. A. These are not my soundings at all.

Q. But you prepared a map on the Government soundings?

A. Yes, sir.

Mr. MOFFAT: I ask that this blue-print be marked for identification, "Defendants' Exhibit 6."

The paper is so marked.

Mr. MOFFAT: I now offer in evidence the paper marked "Defendants' Exhibit 6."

Objected to by counsel for the Government for the reasons heretofore stated, and for the further reason that this is not a competent paper, not being based on calculations or observations made by the witness himself.

The COURT: The objection is sustained.

To which ruling the defendants by their counsel then and there, at the time, duly excepted.

(Here follows map, Exhibit No. 6, marked page 546.)

547 Mr. MINNIS: If your Honor will bear with me just a moment: I have not tried cases very recently, but I think this case is of sufficient importance so we can afford to take the time to consider these points with as much deliberation as they deserve?

The COURT: What points?

DISTRICT ATTORNEY: I cannot follow one attorney making objections and another one offering evidence, at the same time.

The COURT: Proceed one at a time, gentlemen.

Mr. MINNIS: I don't believe it has been stated, as to what is the object of offering this testimony.

I think it is fair to the Court to state the purpose of offering this testimony. We concede that so far as the action of the Secretary of War on the facts in the case is concerned, that is conclusive; but we say it is not conclusive so far as interpreting the statute. In this case he directed a change to be made, not authorized by the statute. Namely, he directed a draw opening that required the dredging of the river in order to comply with it.

DISTRICT ATTORNEY: They had a hearing on that proposition.

Mr. MINNIS: If the Court is not willing to hear me——

The COURT: If I have not made myself understood I am very unfortunate in that.

548 Mr. MINNIS: I understood what you stated, but I believe you are acting under a misapprehension, and I always believed you would allow yourself to be corrected.

The COURT: I am willing to hear you.

Mr. MINNIS: Here is the proposition: We are concluded by the Secretary of War's finding of the fact, but we are not concluded by the Secretary of War's interpretation of the law. It is a well settled doctrine, and for that reason I have felt it incumbent upon me as one of the attorneys in this case, it has never been drawn in question in this kind of a case, that where an executive officer has made a finding, while conclusive as to the fact it is not conclusive as to the law. Suppose he ordered a change made on a non-navigable river? Suppose he found it a navigable river? Your Honor would take the statute and say that his order resulted from a misapprehension of the law.

So in this case, this order results from a misapprehension by the Secretary of War of the law of the case. Why is that true? It is true because he has made an order which it is impossible to comply with. He has made an order requiring the pivot pier of the bridge moved two piers westward and has at the same time required the pivot pier to be over a channel that has at all stages of the water not a less quantity of water than to permit a boat that draws six feet of water. But the order requires the span moved to the west and admit the passage of a boat drawing six feet of water. If we complied with that order and moved the bridge over there — would not be

549 sufficient water to admit the passage of a boat drawing six feet of water; and if we were to comply with it we would have to get dredges and dredge out the channel there. That is what this witness and other witnesses will show, beyond dispute.

Now the legal point is that this statute or law never authorized the

Secretary of War to make a change in anything except the bridge and it did not authorize him to make us dredge in that river, or dig a channel in that river.

In the Union Bridge Company case that proposition was recognized. It says the order was supported by the testimony. Here is all we say: We say the law did not vest in the Secretary of War power to require us to dredge a channel. He did have the power to make us change the bridge; but his order if complied with will necessitate digging a channel. Now we offer to show that where the draw span would be after this change in accordance with the notice from the Assistant Secretary of War, in order to have a channel of the depth required by the order, we would have to cut a channel in the river. I do not believe that your Honor ever contemplated that the Secretary of War would ever make such an order as that. It gave him the power to change the bridge, but not to alter the river. We will show you conclusively that in order to comply with the order and move the span to the west, and at the same time have the span over the channel of the river, and admit the passage of boats drawing six feet of water, two things will have to be
 550 done; we will not only have to change the spans, but will also have to dredge a channel in the river.

That is why we offer the testimony of Mr. Cunningham. I believe with your Honor's positive statement, if you still consider it not material, when you consider the importance of the case and of having it finally settled, it would not be impossible to let the evidence go in. Your Honor controls the verdict of the jury by your instructions, and then the Supreme Court would have our testimony on that matter.

The COURT: This statute provides for a hearing, after notice of such hearing shall have been given to the parties, where testimony in reference to the character of the obstruction may be heard. Now it appears that in this case the notice was given and the parties appeared; testimony was taken; it was upon motion re-heard by the Secretary of War through the Judge Advocate General of the Army; and these questions you now ask me to permit this witness to testify to were questions you had a right to put before the Secretary of War in that hearing. Not having done so to the satisfaction of the Secretary of War, and he having entered his judgment upon the testimony he had, this court is concluded by his finding just as much as this court is concluded by the action of the Postmaster General of the United States when he has had evidence before him which satisfies him that a fraud has been committed and he deprives a person of the right to use the United States mails.

551 Mr. MAHAN: Please read this decision in the Lewis case, by Judge Trieber.

The COURT: We have gone over that case until I have grown tired hearing of it, as District Attorney and Judge. There is no ruling by that decision of the Court of Appeals, and, unless the action of the Postmaster General was made through corruption, or without any evidence at all, his finding was binding and conclusive. That is

what I held, and do hold, and it makes no difference who holds any other way.

To which ruling of the Court the defendants, by their counsel then and there, at the time, duly excepted.

552 T. M. STRAINE, a witness of lawful age, being duly produced, sworn and examined, on the part of the defendants, testified as follows:

Direct examination.

By Mr. R. B. MOFFAT:

Q. What is your name?

A. T. M. Straine.

Q. Where do you reside?

A. Decatur, Illinois.

Q. What is your business?

A. I have charge of Bridges and Buildings of the Wabash Railroad Company.

Q. You are an engineer?

A. No, sir.

Q. Are you familiar with the location of the Hannibal bridge?

A. Yes, sir.

Q. Have you at any time within the past few years made soundings of the Mississippi River from the Missouri shore eastward to the east pier of the draw-span?

A. Yes, sir.

Q. When did you make those soundings?

A. I made them in 1905.

Q. Were the soundings which you then made accurately shown on the map of which the blue-print I now show you is a copy?

553

A. Just as accurately as they could be gotten.

Mr. MOFFAT: I will ask you to have this blue-print marked for identification "Defendants' Exhibit 7."

The paper referred to is so marked.

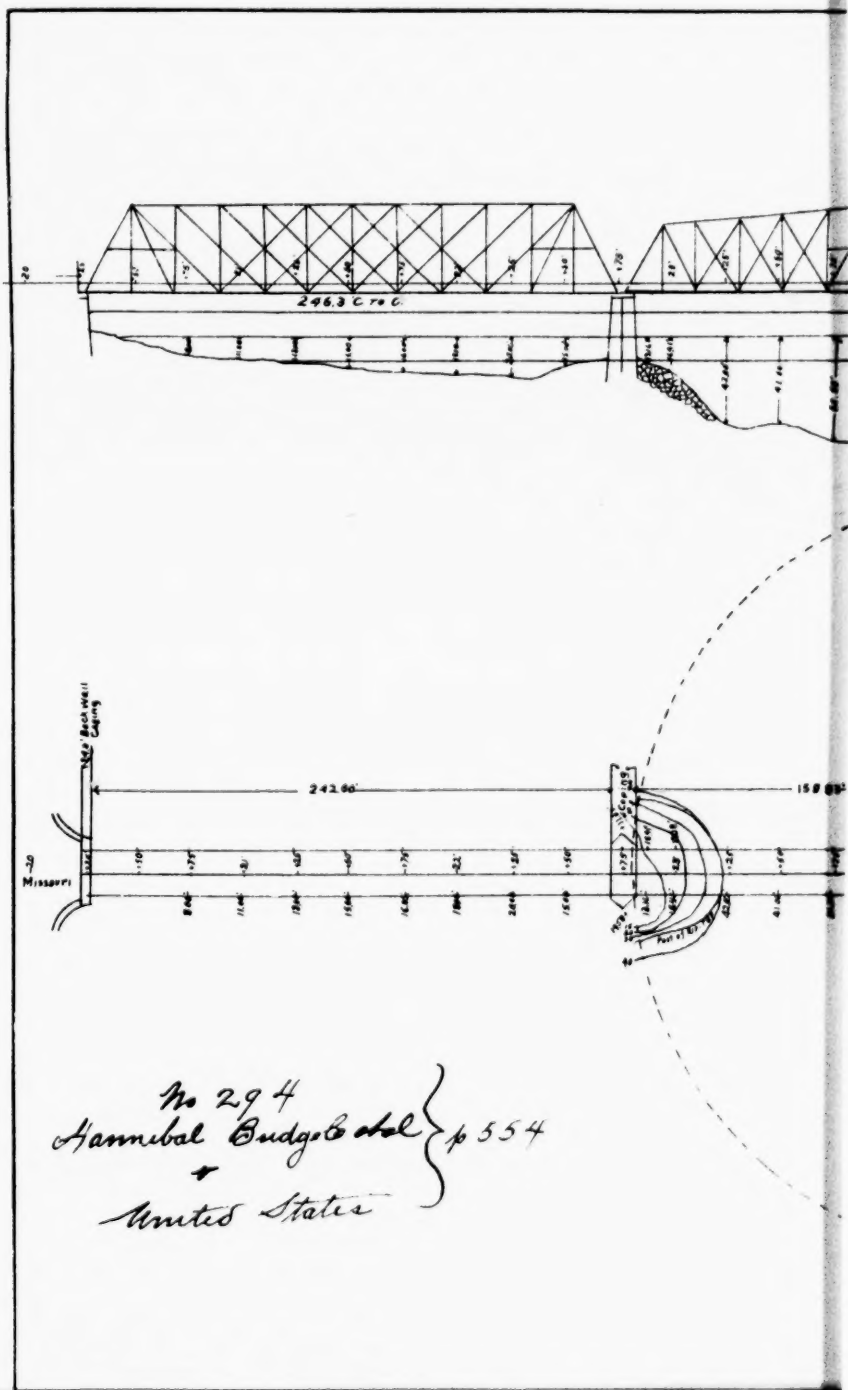
Mr. MOFFAT: I now offer in evidence this blue-print, as "Defendants' Exhibit 7."

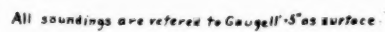
Objected to by counsel for the Government for the reasons heretofore stated.

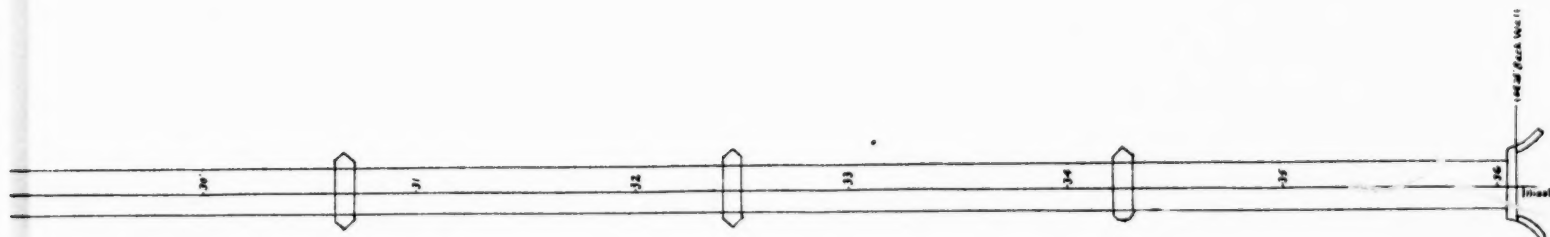
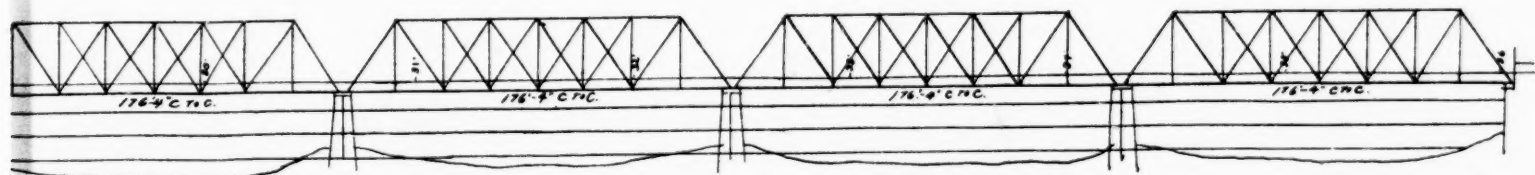
The COURT: The objection is sustained.

To which ruling the defendants by their counsel then and there, at the time, duly excepted.

(Here follows diagram, Exhibit No. 7, marked p. 554.)







WABASH RAILROAD SPRINGFIELD DIVISION.

SOUNDINGS AT

BRIDGE 651.

OFFICE OF THE ENGINEER MAINTENANCE OF WAY

SCALE 40' = 1"

JUN 2 1905



555 Mr. HERBEL: In behalf of the Missouri Pacific Railway Company I offer in evidence the lease of the Missouri, Kansas & Texas Railroad Company to the Missouri Pacific Railway Company dated December 1, 1880, of its whole line of railway, including a line of road from Hannibal in Marion County, Missouri, on the Mississippi River via Moberly, Sedalia, Fort Scott in Labette County, Kansas, 301 miles, more or less.

The COURT: For the purpose of showing you were not in possession and were not owners and had no control of this Hannibal bridge?

Mr. HERBEL: It is for the purpose of showing that at the time the lease of the Hannibal bridge was made, we were operating the Missouri, Kansas & Texas under this lease. That by certain provisions of this lease it could be forfeited by the lessor; that it was forfeited, and we returned the property to the Missouri, Kansas & Texas Railroad Company, or the Receivers in possession of this road at that time; and, therefore, we had no railroad running into Hannibal, Mo., that could be connected with this bridge.

Under numerous decisions of the State courts of Missouri, and the United States Supreme Court and Court of Appeals, a railroad corporation is not authorized to hold stock, or use or lease a bridge unless it constitutes a part of its railway. Now this lease was forfeited in accordance with certain provisions mentioned there. The property was turned over to the Missouri, Kansas & Texas Railroad Com-

pany—

556 The DISTRICT ATTORNEY: Are you testifying?

The COURT: He has a right to state his proposition. I am in doubt myself, I am very frank to say, as to whether or not the testimony here should justify me in sending the case to the jury so far as the Missouri Pacific is concerned.

Mr. HERBEL: That is the reason I am stating my position.

The COURT: That is the reason I am listening to you.

Mr. HERBEL: We can show these facts and I intend to do it. I want to offer this lease as a preliminary. We would be in the attitude of holding a bridge at Hannibal, Missouri, when we have no line of road within 100 miles of it. And by so doing we lay ourselves liable to a prosecution by the Government, or a writ of *quo warranto* to know by what authority we hold it. We have no right to operate that bridge and divert our revenues as a Railroad Company in the operation of that bridge not connected with our railroad. That being true, and we recognizing that fact, we did what the law requires us to do, namely, got rid of the property just as soon as possible, and we did so by assigning it to the Wabash Railroad Company and we thereby lost control of it in the manner in which the law prescribed we should do it. That is the offer and that is the reason I offer this lease.

The COURT: With the view of further emphasizing your position in this case, you may ask, if you desire, the Court to give certain directions to the jury. If you desire to frame any such instructions, so you think you will be in any better shape for your record

557 by asking for certain declarations of law, the Court will be very glad to accommodate you.

The DISTRICT ATTORNEY: I wish to make my position clear regarding the Missouri Pacific Railway Company. Do I understand Mr. Herbel is going to follow his offer of this lease with evidence in support of it?

Mr. HERBEL: Yes, that we have turned the property over to the Missouri, Kansas & Texas Railroad Company, and that the Missouri Pacific Railway Company does not run within 100 miles of Hannibal, Missouri. That appreciating its situation it did the only thing under the law it could do, namely, got rid of this property in the manner which the law allows.

The COURT: You claim you got rid of the property before the alleged offense was committed?

Mr. HERBEL: Eight years before. If you look at the statute you will find it says "owner or controller of the bridge." How can we be held to control that bridge when we have assigned it, as we had a right to do, under the law, and were compelled to do so in order to avoid prosecution from the officers of the law. Your Honor well knows that the Attorney General is after these corporations for operating elevators, coal mines, etc. and he would have a much stronger ground to question our right to operate a bridge at Hannibal, where we have no railroad and can not use it, than to operate coal
558 mines and elevators, which are necessary in the transportation of business.

The COURT: Have you any other testimony?

Mr. HERBEL: I wish to offer this testimony.

The COURT: I am frank to say, and I shall so direct the jury, that the management and ownership of this property at the time this offense is alleged to have been committed, was not in the Missouri Pacific Railway Company.

Mr. HERBEL: Then under those circumstances it is not necessary for me to introduce that proof?

The COURT: No.

The lease referred to is in the words and figures following, to-wit:

559 Missouri, Kansas and Texas Railway Co.
to
The Missouri Pacific Railway Company.

Lease.

Dated December 1, 1880.

560 This Indenture, made the first day of December, Anno Domini one thousand eight hundred and eighty (1880), between the Missouri, Kansas and Texas Railway Company, of the first part, and the Missouri Pacific Railway Company, of the second part:

Whereas, The Railroads of the parties hereto connect directly with each other at Sedalia, in Pettis County, and at Holden, in Johnson County, Missouri, and the said parties are desirous of entering into a lease and contract with each other, in respect to the use,

management and working of the Railroads of the party of the first part.

Now this Indenture witnesseth:

That the party of the first part, for and in consideration of the covenants and agreements hereinafter contained on the part of the said party of the second part to be kept and performed, have leased, demised, and to farm-let, and by these presents do lease, demise, and to farm-let unto the party of the second part, and they do take the railroad of the party of the first part as now constructed and in use and operation as follows, to-wit:

A line of road from Hannibal, in Marion County, Missouri, on the Mississippi River, via Moberly, Sedalia and Fort Scott to Parsons, in Labette County, Kansas, three hundred and one miles, more or less;

A line of road from Junction City, in Davis County, Kansas, to the town of Parsons, in Labette County, Kansas, thence extending southwardly through the Indian Territory to town of Denison, in Grayson County, Texas, four hundred and thirty-one miles, more or less;

A line of road from Denison, in Grayson County, Texas, southeast-
erly to the town of Greenville, in Hunt County, Texas, a distance of
fifty-two miles more or less; and

561 A line of road extending from said town of Denison west-
erly to Gainsville, in Cook County, Texas, a distance of
forty-two miles, more or less;

A total distance of eight hundred and twenty-six (826) miles, more or less, of railroad now in operation, together with all the branch roads and sidings, depots, stations, buildings, equipment, machine and other shops, machinery, tools, appurtenances, and property, real and personal, to said demised railroad belonging and appertaining, as well that now owned as that hereafter to be acquired by the said party of the first part, at and between the said before-mentioned points, or as appertaining thereto, excepting, however, from the demised premises all lands and land grants owned or held by the party of the first part, and all property not needed in connection with or necessary to the use and operation of the said demised railroads.

To have and to hold the said demised property, real and personal, unto the said party of the second part, their successors and assigns, to and for the full end and term of ninety-nine (99) years from the date hereof, fully to be completed and ended.

That in consideration of the premises, the party of the first part hereby covenants and agrees that the party of the second part shall at all times during the term aforesaid, have full and exclusive power, right and authority to use, manage and work the said railroad of the said party of the first part and shall have the right to fix the tolls thereon, but not at a higher rate than is authorized by the charter of the party of the first part hereto; and further, that the said party of the second part shall have full, free and exclusive right to charge and collect all of the said tolls on, and freight charges and dues to accrue from, said railroad during said term, and to appro-

562 priate the same in the way and manner hereinafter mentioned, and shall have, use, exercise and enjoy all the rights, powers, and authority aforesaid, and all other lawful powers and privileges which can or may be lawfully exercised and enjoyed on and about the said demised railroad and property, as exclusively, fully and amply as the same might or could have been used, exercised and enjoyed by the said party of the first part, had this lease and contract not have been made, and as exclusively, fully, amply, and entirely as the said party of the first part have authority to grant the same. It is understood, however, that the lessee Company has no power to make any mortgage of the hereby demised property, which shall in any way affect the rental to be paid to the party of the first part hereunder.

And in consideration of the premises, the party of the second part hereby covenants and agrees to and with the said party of the first part, as follows, viz:

First that the party of the second part shall and will at all times during continuance in force of these presents, work, use, manage, maintain, operate and keep in public use the railroad of the party of the first part, with the appurtenances, and will work, use and efficiently operate the said railroad and appurtenances; and will from time to time provide such additional locomotives, cars and rolling stock as, in the judgment of the party of the second part, shall be required for and properly adapted to promptly and fully accommodate the business tributary to the roads hereby demised; and shall and will use all reasonable diligence to collect and receive all the said tolls, freight charges and dues which shall accrue as aforesaid, and apply and appropriate the same in the way and manner following, to-wit: Firstly, to the payment of the annual cost of repairing, maintaining, and perpetuating for public use the said railroad, with its equipment and property appurtenant thereto, and all the
563 expenses of working, using, managing, maintaining, operating and running the same, including reasonable compensation for the use of engines and cars actually employed thereon, but not owned by the party of the first part; and the cost of any new equipment, side-tracks, stations, depots, lands and reasonable or necessary betterments of every kind that the party of the second part may from time to time deem necessary to procure or provide for the business of said road; and also including premiums for insurance, and all tolls, taxes and assessments now or hereafter levied or assessed under laws of the United States, and of the States of Missouri, Kansas, Texas, and the Indian Territory upon the traffic passing over the said railroads, and upon the property of the party of the first part, now or hereafter acquired by the party of the second part, by and under this lease. Secondly, to the payment of the necessary expenses of maintaining the organization of the Missouri, Kansas and Texas Railway Company, including maintenance of general offices of the company in the city of New York, expenses of a transfer agency and registrar of the stock and bonds of the company, and for paying the interest on its mortgage debt, etc. Thirdly, to the payment of interest as the same shall become due and payable, from time to time,

upon the present consolidated mortgages and underlying bonds, covering the property covered by this lease, as follows, to-wit:

On \$2,296,000 Union Pacific Railway Company Southern Branch first mortgage bonds;

On \$349,000 Tebo and Neosho Railroad Company first mortgage bonds;

On \$768,000 Hannibal and Central Missouri Railroad Company first mortgage bonds;

On \$32,000 Hannibal and Central Missouri Railroad Company second mortgage bonds;

On 14,772,000 Missouri, Kansas and Texas Railway Company consolidated bonds;

On as many Missouri, Kansas and Texas Railway Company
564 general consolidated bonds as have been or may be hereafter issued under the terms of the general consolidated mortgage of December 1st, 1880, upon road accepted and operated hereunder. Fourthly, to pay any surplus remaining to the party of the first part, to be applied to the payment of interest on any other bonds now or hereafter issued by the said first party according to their respective rights and priorities; and for such other purposes as shall be determined from time to time by the Board of Directors of the Missouri, Kansas and Texas Railway Company.

Second. If the net earnings or revenue shall not be sufficient to provide for the fixed charges on the demised property, the lessee may elect to advance the funds required from time to time to pay interest on bonds and other fixed charges and such advances shall be a preferred debt and lien next to the lien of the first and general consolidated mortgages and underlying or divisional mortgages, to be paid by the party of the first part; and the same is secured by the future net revenue of said party, and such advances are hereby made an equitable lien on the demised property.

If the lessee, however, elects not to advance any such deficit, and the interest on the first and general consolidated mortgage bonds and underlying bonds shall remain unpaid for a period of six months, the lessor company may thereupon elect to terminate this lease and to receive back the property on the payment of any balance of indebtedness then due from it to the lessee. Third, and it is further covenanted and agreed by and between the parties hereto, that the extensions now under construction by the party of the first part, in

Texas, from Greenville to Mineola, and from Fort Worth
565 south to a point in Williamson or Milan County, and all such other extensions or branches as shall, during the continuance of these presents, be made by the party of the first part under its charter powers, either by purchase, lease, joint ownership, or under any arrangement for joint use of other roads, construction or otherwise, whenever such additional road or branches shall be completed or acquired and ready for operation, shall be and the same are embraced herein and shall be taken and operated by the party of the second part under like terms and conditions with those specified for the eight hundred and twenty-six (826) miles before mentioned.

Fourth. That the party of the second part shall and will, at all

times during the hereby demised term, keep the buildings upon the lands hereby demised, insured in the usual manner against loss by fire, paying the premium therefor, as aforesaid, and will keep the said demised railroad, equipment, and property in good order and repair, and will at the expiration of the hereby demised term, or other sooner determination of this lease and contract, yield and deliver up the hereby demised railroad and appurtenances in the same good order and repair that the same are now in, or may be put in during the hereby demised term, casualties, acts of God and the elements and reasonable wear and tear excepted.

Fifth. That the party of the second part shall keep accurate accounts of all the business receipts and revenues arising from the said demised railroad and property, and all the expenses of operating the same; said accounts to be kept in such form and manner that the earnings upon the railway and property covered by the income second mortgage may be readily ascertained and determined; and their books relating thereto shall be subject to the examination of 566 the President and Vice-President of the party of the first part, or of any agent duly authorized by them to examine the same, and the party of the second part shall furnish to the party of the first part monthly accounts of the gross receipts and expenditures, and a semi-annual account of all the said business, receipts, revenues and expenditures under this agreement.

And the President, Vice-President and committees of the Board of Directors, and all duly appointed agents of the party of the first part, shall have the right at all times to travel without charge over the said demised railroad, for the purpose of ascertaining as to the business and management of the said railroad and reporting thereon to the party of the first part.

Sixth. It is understood and agreed that in case a plan or agreement, shall be perfected and entered into for the management and operation of the railways of the parties hereto, or either of them, with other southwestern railways under one organization or company, this lease shall thereupon, at the election of the lessee, cease and determine.

Seventh. That if any difference shall arise in relation to this lease and contract between the parties hereto, each of said parties shall select a referee of experience and skill in railway management, and the said referee shall select another of like experience and skill, and the three so chosen shall hear and decide such differences, and their decisions, or that of a majority of them, shall be final and conclusive upon the parties hereto. Eighth. It is expressly understood that the lease of the line of railway known as the "Holden Branch" of the first party, made by the party of the first part to the party of 567 the second part, under date of February 16th, 1880, remains unaffected by this lease and contract, except as to the term of duration, and the demised premises in the said lease are not embraced in the demised premises of these presents.

It is further agreed between the parties hereto that the said lease of February 16th, 1880, is hereby extended under the terms and provisions thereof for and during the whole period of the continuation

of these presents, to which the parties hereto do hereby severally agree.

In witness whereof, the parties hereto have caused this indenture to be signed by their respective President *pro tem.* and President, and their respective corporate seals to be hereto affixed, attested by their respective Secretaries, this fourth day of May, 1881.

MISSOURI, KANSAS AND TEXAS
RAILWAY COMPANY,
By GEO. J. FORREST, *President pro tem.*

(Seal stamped as follows:)

[Missouri, Kansas and Texas Railway Company, 1870.]

Attest:

H. B. HENSON, *Sec'y.*

THE MISSOURI PACIFIC RAIL-
WAY COMPANY,
By JAY GOULD, *President.*

(Seal stamped as follows:)

[The Missouri Pacific Railway Company.]

Attest:

A. H. CALEF, *Sec'y.*

568 STATE OF NEW YORK,
City and County of New York, ss:

Be it Remembered, that on this Twenty-fifth day of August A. D. 1881, before me, Charles Nettleton, a Commissioner — the States of Missouri, Kansas & Texas, and a Notary Public, in and for the State and County of New York residing in said City of New York, personally appeared George J. Forrest the President *pro tem.* and H. B. Henson, the Secretary of the Missouri Kansas and Texas Railway Company to me respectively personally known to be such, who being by me severally duly sworn, did depose and say, that he, said George J. Forrest, resides in New York City, State of New York, that he, said H. B. Henson resides in New York, that he, said George J. Forrest, is the President, *pro tem.* and he, said H. B. Henson is the Secretary of the said Company, and that they both know the corporate seal of said Company; that the seal affixed to the foregoing instrument *os* such corporate seal; that it was so affixed thereto by order of the Board of Directors of said Company, and that they, the said George J. Forrest & H. B. Henson as such President, *pro tem.* & Secretary signed the name of said Company, and their own names thereto, by the like order, as President *pro tem.* and Secretary of said Company, respectively, and they each, respectively, being personally known to me to be the same persons whose names are signed to the foregoing instrument as parties thereto, acknowledged to me that they signed, sealed and executed the same as their own free and voluntary act and deed, and as the free and voluntary act and deed of the said Company, for the purposes and objects herein stated.

569 In Witness whereof, I have hereunto set my hand and affixed my official seal, this the Twenty-fifth day of August A. D. 1881.

[SEAL.]

CHARLES NETTLETON,
Commissioner for Missouri in New York.

[SEAL.]

CHARLES NETTLETON,
Commissioner for Kansas in New York.

[SEAL.]

CHARLES NETTLETON,
Commissioner for Texas in New York.

[SEAL.]

CHARLES NETTLETON,
Notary Public for New York County in New York.

570 STATE OF NEW YORK.

City and County of New York, ss:

Bt it remembered, that on this twenty-fifth day of August A. D. 1881, before me, *Charles Nettleton* a *Commissioner* for the States of *Missouri Kansas* and *Texas* and a *Notary Public*, in and for the State and County of New York, residing in said City of New York, personally appeared *Jay Gould*, the *President*, and *A. H. Calef*, the *Secretary* of *The Missouri Pacific* railway Company, to me respectively personally known to be such, who being by me severally sworn, did depose and say, that he, said *Jay Gould*, resides in New York City, State of New York, that he, said *A. H. Calef* also resides in New York City, New York, that he, said *Jay Gould* is the *President*; and he, said *A. H. Calef* is the *Secretary* of the said Company; that they both know the corporate seal of said Company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the Board of Directors of said company, and that they, the said *Jay Gould* & *A. H. Calef*, as such *President* & *Secretary*, signed the name of said Company, and their own names thereto, by the like order, as *President*, and *Secretary* of said Company, respectively, and that each, respectively, being personally known to me to be the same persons whose names are signed to the foregoing instrument as parties thereto, acknowledged to me that they signed, sealed and executed the same as their own free and voluntary act and deed, and as the free and voluntary act and deed of the said Company, for the purposes and objects therein stated.

571 *In witness whereof*, I have hereunto set my hand and affixed my official seal, this the Twenty-fifth day of August A. D. 1881.

[SEAL.]

CHARLES NETTLETON,
Commissioner for Missouri in New York.

[SEAL.]

CHARLES NETTLETON,
Commissioner for Kansas in New York.

[SEAL.]

CHARLES NETTLETON,
Commissioner for Texas in New York.

[SEAL.]

CHARLES NETTLETON,
Notary Public for New York County in New York.

(Following this are the certificates of the County Clerks, of the several Counties in the States of Missouri, Kansas & Texas where said Lease was recorded, being 44 in number.)

572 Whereupon the Court delivered the following charge to the Jury:

Gentlemen of the Jury:

This is an information filed by the United States District Attorney against the Hannibal Bridge Company, the Wabash Railroad Company and the Missouri Pacific Railway Company for failing to comply with an order of the Secretary of War with reference to the bridge that was constructed at and opposite Hannibal, Missouri.

The Congress of the United States by an Act approved March 3, 1899, enacted this statute:

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify

573 the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding Five Thousand Dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: Provided, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants."

It is charged in this information that the Secretary of War gave notice as follows:

574 "Take notice that:

Whereas, the Secretary of War has good reason to believe that the drawbridge, commonly known as the Wabash Railway

Bridge, owned or operated by the Hannibal Bridge Company, *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable water-ways of the United States) on account of unsuitable location of the draw-spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers; there being difficulty in passing the draw-openings or draw-spans of such bridge by rafts, steamboats or other water-craft;

And, whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy and unobstructed, to-wit:

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib work, to be built above and below the new pivot pier; the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw-openings on the new location of draw-span to give at all stages of the river a clear width of water-way of not less than one hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers;

And, whereas, To March 15th, 1907, is a reasonable time in which to alter the said bridge as described above;

Now, therefore, In obedience to, and by virtue of, section eighteen of an Act of Congress of the United States entitled "An Act making appropriations for the construction repair and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899 (30 Stat. L. 1153), the Secretary of War hereby notifies the said Hannibal Bridge Company, the Wabash Railroad

Company and the Missouri Pacific Railway Company to alter
575 the said bridge as described above, and prescribed that said alterations shall be made and completed on or before March 15th, 1907.

ROBERT SHAW OLIVER,
Asst. Secretary of War."

Now it is charged that after an information was lodged with the Secretary of War he directed a hearing to be had, and the parties interested were notified to appear; and evidence has been introduced in this case showing that the defendants, the Hannibal Bridge Company, the Wabash Railroad Company and the Missouri Pacific Railway Company, were notified to appear before an Engineer of the Army and their testimony and evidence was taken; that a hearing was had, and report of the officer made, and thereafter the Secretary of War directed that these changes be made in this bridge.

Congress had the right to confer upon the Secretary of War this power; and the Secretary of War had the right, after notice given to the parties for the hearing, to make the order requiring these changes to be made in the bridge. And it is not for me, nor for you gentlemen of the jury, to discuss or try to determine the question of whether the changes directed to be made in the bridge were improper or not. The Secretary of War is by this Act of Congress clothed with the authority to say whether this is an impediment to the navigation of the river or not.

If you find from the evidence he has said so, by an order he has issued in this matter, and that was served upon these defendants, and they have not complied with it, and that they were in the
576 management and control of that bridge, and failed to comply with the order made by the Secretary of War within the time that he limited them to be made, then these defendants who had charge and control of that bridge were guilty of a violation of this statute.

Each count of this information covers a period of time, one month following another, and for each month they subject themselves to the penalty prescribed by this statute.

The evidence does not satisfy me that the Missouri Pacific Railway Company, one of the defendants herein, was either the owner or had control of, or any part in the management of the Hannibal Bridge at the time the alleged offenses were committed; and in returning your verdict you will return a verdict as to the Missouri Pacific Railway Company of Not Guilty on each of these counts.

If you find from the evidence in the case that the Hannibal Bridge Company and the Wabash Railroad Company were managing and controlling that bridge at the time alleged in this information, and that they had notice of the hearing originally had at Rock Island, Illinois, and that the Secretary of War thereafter, acting upon the hearing thus had and the evidence thus presented, made an order to change the bridge, then I direct you that the failure to comply with that direction of the Secretary of War was a violation of this statute.

This is a criminal proceeding, to be sure, and in this case as in all cases the burden is upon the Government to show, (beyond a reasonable doubt) to your satisfaction, that the defendants
577 have been guilty of the offences complained of.

The question of the guilt or innocence of the Hannibal Bridge Company and the Wabash Railroad Company are submitted to you for your verdict under the instructions of the Court and the evidence you have heard given in this case.

Col. BLODGETT: I desire to except to the charge for the reason that the charge throughout assumes that the notice was given by the Secretary of War; and furthermore because the charge assumes throughout that the notices describe the changes that were required to be made.

The COURT: I may state, so we may have this question preserved, if we can, that the notice signed by the Assistant Secretary of War, read in evidence here, is a sufficient notice under the statute to which

I have referred, and that the changes required to be made were and are sufficiently definite to require compliance with the order.

Mr. MOFFAT: May I except, on behalf of both defendants, to so much of your Honor's charge as instructed the jury that the Assistant Secretary of War had a right to make the order directing the change, and that this court cannot supervise the propriety of any changes ordered by him.

The DISTRICT ATTORNEY: I would request your Honor to embody in your charge this clause:

578 If I understood your charge correctly you said "If you believe from the evidence"; you at that time took up the notice sent out by the Secretary of War.

I ask you to embody in your charge the following: "If you believe that notice was sent and a hearing held thereon and the Secretary of War acted on the evidence.

The COURT: I aimed to make myself clear on that point.

Gentlemen of the jury: If you find that the notices were sent out from the War Department; that these notices were served upon these defendants; that a hearing was held at Rock Island; and that the Secretary of War acted upon the evidence taken at that hearing, then the action of the Secretary of War is conclusive upon this court.

Thereupon the jury retired, to consider and deliberate on their verdict, and on the 28th day of May, 1908.

The jury returned the following verdict:

"We, the jury, find the defendants The Wabash Railroad Company and the Hannibal Bridge Company guilty as charged in the information.

E. F. AFLICK, *Foreman.*"

We, the jury, by direction of the Court, find the defendant Missouri Pacific Railway Company, not guilty.

E. F. AFLICK, *Foreman.*

579 Thereupon court adjourned until tomorrow morning, Friday, May 29, 1908.

HANNIBAL, MO., May 29, 1908.

Court convened at nine o'clock in the forenoon of Friday, May 29, 1908, and the following proceedings were had:

The DISTRICT ATTORNEY: I move that sentence be passed upon the return of the verdict of the jury.

The COURT: Is there any reason known to counsel why sentence should not be entered by the Court on that verdict?

The COURT: Considering the penalty or fine to be assessed, under this verdict, the statute gives discretion to the court in that the fine shall not exceed \$5,000 in each case. The relations sustained by the Hannibal Bridge Company to the other defendants joined with it in this case are such that a fine of \$2500 will be imposed upon the Hannibal Bridge Company under the first count of this information.

A fine of \$2500 will be imposed upon the Wabash R. R. Co. under the first count of this information.

A fine of \$2500 will be imposed upon the Hannibal Bridge Company under the second count of this information.

A fine of \$2500 will be imposed upon the Wabash Railroad Company under the second count of this information.

Making a total fine against the two companies of \$10,000.

580 And on the 29th day of May, 1908, at the same term of court in which said verdict was found, and within four days thereafter to wit the next day after the rendering of said verdict, the defendants Hannibal Bridge Company and the Wabash Railroad Company, filed their motion for a new trial, as follows:

"In the District Court of the United States for the Northern Division of the Eastern Judicial District of Missouri, May Term, 1908.

UNITED STATES, Plaintiff,

vs.

HANNIBAL BRIDGE COMPANY and WABASH RAILROAD COMPANY,
Defendants.

Motion for New Trial.

Defendants move the Court to set aside the verdicts herein and grant a new trial herein:

1. Because the Court admitted any testimony offered by the United States.

2. Because the Court admitted illegal and improper testimony offered by the United States.

3. Because the Court excluded legal and proper testimony offered by defendants.

4. Because the Court, of its own motion, gave to the jury illegal and improper instructions, and illegal and improper declarations of law.

581 5. Because the Court, at the instance of the United States, gave to the jury illegal and improper instructions and illegal and improper declarations of law.

6. Because the Court refused to give proper and legal instructions and proper and legal declarations of law asked by defendants.

7. Because the Court erred in the admission and rejection of testimony and in the giving and refusal of instructions and declarations of law, all against the objection of the defendants at the time.

8. Because the verdicts are against the law and evidence, and against the law under the evidence.

9. Because the verdicts should have been against the United States instead of against the defendants.

10. Because the Court overruled the demurrer to the evidence at the close of the case by the United States.

11. Because the Court overruled the demurrer to the evidence at the close of all the evidence.

12. Because the Court overruled defendants' motion at the close of all the evidence to direct a verdict for defendants.

13. Because the Court excluded competent and proper evidence offered by the defendants tending to prove that the Hannibal bridge was and is a lawful structure, and that the same was built and has ever since been at all times maintained in accordance with the Act of Congress of July 25th, 1866, authorizing its erection.

582 14. Because the defendants were entitled to have the witnesses against them produced in court, and to be confronted with the witnesses against them.

15. Because the Court excluded competent and proper evidence offered by the defendants tending to prove that the notice of March 10th, 1906, to alter the bridge was an arbitrary and unlawful exercise of power by the Secretary of War, and was therefore illegal and void.

16. Because the Court erred in instructing or charging the jury that the Assistant Secretary of War was authorized by law to give the defendants a notice requiring them to make alterations in the bridge.

17. Because the Court erred in charging the jury that the notice to the defendants signed "Robert Shaw Oliver, Assistant Secretary of War," described the alterations required to be made in the bridge with sufficient accuracy to enable the defendants to comply therewith.

R. BURNHAM MOFFAT,

Attorney Hannibal Bridge Company.

WELLS H. BLODGETT,

JAS. L. MINNIS &

GEO. A. MAHAN,

Attorneys for Wabash Railroad Company."

Said motion for a new trial was on the 29th day of May, 1908, overruled; to which ruling and order of the Court the defendants then and there duly excepted.

And on the 29th day of May, 1908, at the same term of court in which said judgment was rendered, and the same day on
583 which said judgment was rendered, the defendants Hannibal Bridge Company and Wabash Railroad Company filed their motion in arrest of judgment, as follows:

In the District Court of the United States for the Northern Division of the Eastern Judicial District of Missouri, May Term, 1908.

UNITED STATES, Plaintiff,

vs.

HANNIBAL BRIDGE COMPANY and WABASH RAILROAD COMPANY,
Defendants.

Motion in Arrest of Judgment.

Now come defendants and move the Court to arrest the judgment herein for the following reasons of record herein:

1. That the Court obtained no jurisdiction over the person of any defendant herein.

2. That the Court has no jurisdiction over the subject matter of this action.

3. That the information does not state facts sufficient to constitute a cause of action herein.

4. That the information does not state facts sufficient to constitute a cause of action against any defendant herein.

5. Because the information is insufficient in that it does not charge the defendants with any offense under any law of the United States.

6. Because the information does not charge the defendants with the commission of any offense against any law of the United States within the jurisdiction of this court.

7. Because it does not appear from the record that the court had any jurisdiction over the defendants.

8. Because the information is not sufficient to inform the defendants of the nature and cause of the accusation against them.

9. That the judgment should have been for the defendants instead of the United States.

10. That upon the record there is manifest error in said judgment.

11. That this motion was filed in same term of and within four days after rendition of verdict herein.

R. BURNHAM MOFFAT,

Attorney Hannibal Bridge Company.

WELLS H. BLODGETT,

JAS. L. MINNIS &

GEO. A. MAHAN,

Attorneys for Wabash Railroad Co."

Said motion in arrest of judgment was on the same day, to-wit, the 29th day of May, 1908, by the Court denied.

To which ruling and order of the Court the defendants then and there duly excepted.

And on the 29th day of May, 1908, and during same term of court an affidavit for appeal was duly filed in words and figures as follows, to-wit:

584½

(Copy.)

Affidavit for Appeal.

In the District Court of the United States for the Northern Judicial District of Missouri.

UNITED STATES, Plaintiff.

vs.

HANNIBAL BRIDGE COMPANY & WABASH RAILROAD COMPANY,
Defendant.

The Defendants (by their duly authorized Agent George A. Mahan), pray an appeal herein. George A. Mahan duly authorized

Agent of defendants being duly sworn, states that he is the Agent of Appellants for the purpose of taking an Appeal herein, and further says, on oath, that said appeal in the above entitled cause is not made for vexation or delay, but because this affiant and appellants believe that the said appellants are aggrieved by the judgment and decision of the above named court in said cause.

GEORGE A. MAHAN.

Subscribed and sworn to before me this 29 day of May 1908.

GEO. C. MOORE, *Clerk*.

Endorsed: No. 314. United States Plaintiff *vs.* Hannibal Bridge Co. Wabash Railroad Co. Defendants. Affidavit of Defendants Appellants. Filed in the office of the Clerk of the District Court of the United States this 29 day of May 1908. Geo. C. Moore, Clerk.

585 And that the above matters and things, rulings and exceptions, may be made a part of the record, defendants within the time allowed by the Court tender this, their bill of exceptions, and pray that the same may be signed and sealed as such.

Which is accordingly done this 22 day of Sept. 1908.

DAVID P. DYER,

*Judge of the District Court of the United States
for the Northern Division of the Eastern Judicial
District of Missouri.*

Sept. 22, '08.

O. K.

HENRY W. BLODGETT,

U. S. Att'y.

Endorsed: No. 314. The United States *vs.* The Hannibal Bridge Company, The Wabash Railroad Company, and The Missouri Pacific Railway Company, Defendants. Bill of Exceptions. Filed September 24th, 1908. Geo. C. Moore, Clerk.

586 Afterwards, to-wit: on the 21st day of October, A. D. 1908, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

THE UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD
COMPANY, Defendants.

Now, at this day come the defendants, by their Attorneys, R. Burnham Moffat, Wells H. Blodgett, Jas. L. Minnis and Geo. A. Mahan, Esq., and file Assignment of Errors herein.

Which Assignment of Errors is in words and figures as follows, to-wit:

In the District Court of the United States for the Northern Division
of the Eastern District of Missouri.

THE UNITED STATES, Plaintiff,

vs.

HANNIBAL BRIDGE COMPANY and WABASH RAILROAD COMPANY,
Defendants.

Assignment of Errors.

The defendants-appellants assign the following errors which they respectfully submit occurred upon the trial of this cause.

I.

The Court erred in overruling the defendants' demurrer to the information:

1st. Because it appears on the face of the information that the Secretary of War did not give notice to the defendants or either of them to alter the bridge.

2nd. Because failure or refusal to comply with a notice to alter the bridge given by the Assistant Secretary of War is the only failure or refusal charged against the defendants, and such failure or refusal does not constitute an offense under the statute.

3rd. Because said information is insufficient and bad for repugnancy in its material allegations in this, to-wit: That the allegation that the Secretary of War gave the defendants notice to alter said bridge is repugnant to and inconsistent with the subsequent allegation that the notice given to the defendants was in substance the same as the paper writing set forth in said information, signed "Robert Shaw Oliver, Assistant Secretary of War."

4th. Because the alleged notice set forth in the information does not specify the changes that are required to be made in the bridge with such particularity as to enable the defendants to comply therewith in this, to-wit: That said alleged notice states that "new and solid long or protection piers of crib-work shall be built above and below the (proposed) new pivot-pier," but does not specify or inform the defendants as to the length of the new and solid, long or protection piers they are required to build above and below said new pivot-pier in order to comply with said pretended notice.

5th. Because said alleged or pretended notice requires that "proper guard fences be built along the Missouri shore above and below the (proposed) new shore pier," but does not specify or inform the defendants as to the length of the guard fences to be constructed along the Missouri shore by them or the kind of material of which said guard fences are to be constructed.

6th. Because the notice to defendants to alter the bridge, set out in the information, did not specify the changes to be made as required by statute.

II.

The court erred in admitting in evidence the certified copy of the notice of March 10, 1906, addressed to the Hannibal Bridge Company, in the following words and figures, and the certified copy of the notice of the same date addressed to the Wabash Railroad Company in substantially the same words and figures, that is to say:

"WAR DEPARTMENT,
WASHINGTON CITY, March 10, 1906.

Take notice that:

Whereas, The Secretary of War has good reason to believe that the draw bridge, commonly known as the Wabash Railway Bridge, owned or operated by the Hannibal Bridge Company (and by the Wabash Railroad Company), *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable waterways of the United States) on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers, there being difficulty in passing the draw openings or draw spans of such bridge by rafts, steamboats, or other water craft.

And whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy, and unobstructed, to-wit:

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot-pier, a new west draw-rest pier to be constructed near the Missouri shore, the present pivot-pier to be cut down and converted into an east-draw-rest pier, the present draw-span to be moved west, new and solid long or protection piers, of crib work, to be built above and below the new pivot piers, the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw openings on the new location of draw span to give at all stages of the river a clear width of waterway of not less than one hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers;

And whereas, to March 15, 1907, is a reasonable time in which to alter the said bridge as described above;

Now therefore, in obedience to, and by virtue of, section eighteen of an Act of the Congress of the United States entitled "An Act making appropriations for the construction repair and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, (30 Stat. L. 1153), the Secretary of War hereby notifies the said Hannibal Bridge Company (and the said Wabash Railroad Company) to alter the said bridge as described

bove, and prescribes that said alterations shall be made and completed on or before March 15, 1907.

ROBERT SHAW OLIVER,
Ass't Secretary of War."

or the reasons that:

(1) Neither of the paper writings offered proves or tends to prove any material allegation or charge contained in the information and is not a notice given or signed by the Secretary of War;

(2) The Secretary of War could not lawfully delegate to the Assistant Secretary of War the duty and discretion reposed in him by section 18 of the River and Harbor Act approved March 3, 1899;

(3) There was a variance between the allegations contained in the information and in said paper writings in this, to-wit: The information charges that the Secretary of War gave notice to the defendant corporations, as parties owning and operating the bridge, to alter the same so as to render navigation through and under it reasonably free, easy and unobstructed; whereas neither of said paper writings requiring the defendants to alter the bridge in the manner aforesaid, was a notice signed, given or promulgated by the Secretary of War;

(4) The Assistant Secretary of War was and is authorized by law to perform only such duties as were prescribed by the Secretary of War or were required by law; and there was not and never had been any law authorizing any Assistant Secretary of War to give notice to any person or persons or corporation owning or controlling any bridge over any of the navigable waters of the United States, to alter the same in any respect, nor had the Secretary of War at or before the date of said paper-writings, or at or before the alleged delivery of a copy thereof to the defendants, or to any of them, ever directed or prescribed it as the duty of any Assistant Secretary of War to give notice to any person, persons or corporation, owning or operating any bridge over any of the navigable waters of the United States, to alter the same or to direct or require them to alter the same in any manner whatsoever;

(5) The evidence introduced by the government showed affirmatively that the Secretary of War did not give consideration to the matter, did not exercise the discretion reposed in him by the Act of March 3rd, 1899, did not make any notice to alter, did not approve any findings of any subordinate or subordinates in his department, did not pass upon any recommendations made by any subordinate, and did not give any notice to any of the defendants.

(6) The paper-writings of March 10, 1906, signed "Robert Shaw Oliver, Assistant Secretary of War," did not specify or describe the alterations required to be made in the bridge with such certainty as would enable the defendants to comply therewith, in this, that said paper writings, among other things, state that new, solid, long or protection piers, of crib work shall be built above and below the new piers, whereas the length of the protection piers required to be built by the defendants is nowhere stated in said paper-writings;

(7) The said paper-writings did not state the alterations required to be made in said bridge so as to enable the defendants to comply with the same, in this, that while said paper writings, among other things, state that proper guard fences shall be built along the Missouri shore above and below the new shore pier, they nowhere state the length, height or width of said guard fences, or state what would constitute or be regarded by the Secretary of War as proper guard fences, either above or below the proposed new shore pier when made.

III.

The court erred in admitting in evidence the certified copy of the letter of Major C. S. Riche to Brig. Gen. A. Mackenzie of March 28, 1906, wherein the writer stated that on March 17th a duplicate of the notice of March 10, 1906, was served on the Secretary and Treasurer of the Hannibal Bridge Company, and that an affidavit covering the facts in the case had been made by Mr. Dunn, the individual who had served the paper, for the reasons that:

- (1) Said letter was not competent proof of the facts therein stated;
- (2) Said letter did not tend to prove the service of the notice of March 10, 1906, as therein stated;
- (3) Said letter was immaterial for any purpose because written subsequently to the making of the notice of March 10, 1906, and did not tend to prove any of the allegations charged in the Information.

IV.

The court erred in admitting in evidence the certified copies of the three affidavits of James C. Dunn, sworn to respectively on March 24, 1906, March 27, 1906, and March 17, 1906, in each of which affidavits the affiant deposed that on March 17, 1906, he had made service of the notice of March 10, 1906, upon the Hannibal Bridge Company by personally delivering a duplicate thereof to the Secretary and Treasurer of said Company at his residence in Brooklyn, N. Y., for the reasons that:

- (1) Said affidavits were not competent proof of the facts therein set forth;
- (2) Said affidavits did not competently tend to prove the service of the notice of March 10, 1906, upon the defendant, The Hannibal Bridge Company;
- (3) The defendants were entitled by law to be confronted with the witnesses against them in a criminal proceeding with the right to cross examine said witnesses and could not be deprived of such rights by the substitution of affidavits in place of the oral testimony of such witnesses.

V.

The court erred in admitting in evidence the certified copy of the affidavit of W. H. Bixby, sworn to March 17, 1906, in which affidavit the affiant deposed that on March 16, 1906, he had made service of the notice of March 10, 1906, upon the Wabash Railroad Company by personally delivering a duplicate thereof to F. A. De-

ano, the president of said Company, at the Western Union Building, Chicago, Ill., for the reasons that:

(1) Said affidavit was not competent proof of the facts therein set forth;

(2) Said affidavit did not competently tend to prove the service of the notice of March 10, 1906, upon the defendant, the Wabash Railroad Company;

590 (3) The defendants were entitled by law to be confronted with the witnesses against them in a criminal proceeding with the right to cross-examine said witnesses and could not be deprived of such rights by the substitution of affidavits in place of the oral testimony of such witnesses.

VI.

The court erred in admitting in evidence the certified copy of the letter of March 23, 1906, addressed to Hon. William H. Taft, Secretary of War, and signed "N. H. Swayne," stating among other things that, without a hearing by the Secretary of War, a notice signed by Gen. Oliver, Assistant Secretary of War, dated March 10, 1906, had been served on the Bridge Company and on the Wabash Railroad Company, ordering certain changes in the bridge at an estimated cost of \$160,000, and requesting that inasmuch as "we have not had a hearing by you, provided for by law and asked for by us," the order of March 10, 1906, made by Gen. Oliver should be annulled and that a hearing be granted by the Secretary of War at a date to be fixed, for the reasons that:

(1) Said letter was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations charged in the information;

(2) There was no competent proof that N. H. Swayne was an authorized representative of the defendants or of either of them.

VII.

The court erred in admitting in evidence the certified copy of the endorsement on said letter of March 23, 1906, addressed to Hon. William H. Taft, Secretary of War, and signed "N. H. Swayne," said endorsement being in words and figures following:

"WAR DEPARTMENT,
OFFICE OF THE SECRETARY.

Memorandum for the Chief of Engineers.

Letter of N. H. Swayne *in re* matter of the Hannibal Bridge across the Mississippi River at Hannibal, Mo.

The Secretary of War desires to give a hearing in this case.

March 26, 1906.

FRED CARPENTER,
Private Secretary."

for the reasons that the same was written subsequently to the making and issuance of the order of March 10, 1906, and did not tend to prove any of the allegations charged in the information.

VIII.

The court erred in admitting in evidence the certified copy of the second endorsement on said letter of March 23, 1906, signed "N. H. Swayne" and addressed to Hon. William H. Taft, Secretary of War, which endorsement bears date of March 28, 1906, and is signed "A. Mackenzie, Brig. Gen., Chief of Engineers, U. S. Army," and is in the words and figures following:

"1. Respectfully returned to the Secretary of War.

2. The hearing in the matter of the Hannibal Bridge was
591 public and the voluminous papers and legal presentation show that all the evidence in the case was the common possession of both parties to the controversy. The report submitted by Maj. C. S. Riche, Corps of Engineers, was not a decision, but simply his opinion, and all the facts upon which his opinion was based were before the War Department. The matter was given full consideration irrespective of such report.

3. I know of no reason why he should have been expected to furnish a copy of such report direct; but, however, there can be no objection to its being furnished to the representatives of the Bridge Company, and a press copy is herewith, and if the same meets with the approval of the Secretary of War it is suggested that such copy be sent to Mr. Swayne, with authority to have such copies made as he may desire.

4. Assuming that the Secretary of War intends to give a personal hearing in this matter, I make the suggestion that the complainant against the Bridge be offered and opportunity to present their side of the case.

5. The matter has been before the district engineer's office for many years and in connection with latest complaints was under consideration for nearly a year; and the public hearing required by law and the orders of the Department has already been held by the district officer.

6. The complaint upon which the present action was taken was filed by Capt. John Kileen, Superintendent, Diamond Jo Line Steamers, whose address is Dubuque, Iowa. He is doubtless informed as to others interested in the matter who would wish to be represented at any further hearing.

7. If authorized to do so, I could also cause public notice of the intended action to be given through the engineer office at Rock Island, Ill." for the reason that the same was written subsequently to the making and *issua* issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations charged in the information.

IX.

The court erred in admitting in evidence the certified copy of the letter of April 21, 1906, addressed to Mr. N. H. Swayne, Toledo, Ohio, and signed "Robert Shaw Oliver, Assistant Secretary of War" in the words and figures following:

"SIR: Referring to your letter of 26th ultimo, in which you request a personal hearing before final action is taken in the matter of the Hannibal Bridge across the Mississippi River at Hannibal, Mo., I

beg to inform you that Secretary Taft has authorized the Judge-Advocate General of the Army to afford a personal hearing to interested parties, after duly advising them of the date thereof.

In further compliance with your request, a copy of the report of Major Riche is transmitted herewith, and you are hereby authorized to make as many copies thereof as may be necessary."

for the reason that the same was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations contained in the information.

X.

The court erred in admitting in evidence the certified copy of the memorandum bearing date of April 9, 1906, signed "Fred W. Carpenter, Private Secretary," in the words and figures following:

"WAR DEPARTMENT
OFFICE OF THE SECRETARY.

Memorandum for the Judge-Advocate General.

Correspondence in case of Hannibal Bridge.

The Secretary of War wishes to give the parties a rehearing in the Hannibal Bridge matter. He is so pressed with other matters that he is not able to attend to it personally and desires you to hear them. Will you please fix the date and notify the parties?"

for the reason that the same was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations contained in the information.

XI.

The court erred in admitting in evidence the certified copy of the report signed "Geo. B. Davis, Judge-Advocate General," addressed to the Secretary of War under date of May 15, 1906, wherein report is made at length upon the hearing had and the writer among other

things said: "While there is considerable doubt as to whether
592 the bridge, as constructed, is 'an unreasonable obstruction to the free navigation of such waters' for any of the reasons stated, I think it is established in evidence that 'there is difficulty in passing the draw opening or the *draw span of such* bridge by rafts, steamboats or other water crafts,' and that *for that reason* the order directing alterations was properly issued," and concluded that the case presented came within the operation of section 18 of the Act of March 3, 1899, and that the action theretofore taken by the department should be adhered to, for the reason that the same was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations contained in the information.

XII.

The court erred in admitting in evidence the certified copy of the

endorsement on the report of the Judge-Advocate General of May 15, 1906, in the words and figures following:

"Approved:

Let the Chief of Engineers act accordingly.

WM. H. TAFT,

Secy. of War.

July 14, 1906."

for the reason that the same was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations contained in the information.

XIII.

The court erred in admitting in evidence the certified copies of the three letters of July 20, 1906, each signed "Robert Shaw Oliver, Acting Secretary of War" and addressed respectively to George A. Mahan, Attorney for the Hannibal Bridge Company, Hannibal, Missouri; F. A. Delano, President Wabash Railroad Company, Western Union Building, Chicago, Ill.; and Noah H. Swayne, Attorney at Law, 49 Produce Exchange, Toledo, Ohio, which letters advised that under date of July 14, 1906, the Secretary of War approved the conclusions reached by the Judge-Advocate General of the Army, as a result of the rehearing, to the effect that the previous action of the department ordering certain changes in the Hannibal Bridge across the Mississippi River at Hannibal, Mo., with a view to rendering navigation through or under it easy, free and unobstructed, should stand and that action be taken accordingly, for the reason that each of said letters was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations contained in the information.

XIV.

The court erred in refusing at the close of the government's case to direct a verdict of Not Guilty in favor of defendants, for the reasons that:

(1) The evidence adduced did not show or tend to show that the Secretary of War had granted to the defendants a hearing or an opportunity to be heard in relation to the complaint against the bridge or the proposed changes therein, but on the contrary affirmatively showed that the only hearing held on said matter was by the Assistant Secretary of War.

(2) The evidence adduced did not show or tend to show that the Secretary of War had good reason to believe or had determined that said bridge was an unreasonable obstruction to the free navigation of the river or that he took any action with reference to said bridge, or that he gave or caused to be given to the defendants, or to either of them, any notice that required the changing or altering of said bridge, or that he exercised his judgment or discretion in respect to the changes or alterations in said bridge, or performed or caused to be performed or approved any of the acts in said proceeding or with respect to the proposed alterations in said

bridge, but on the contrary affirmatively showed that the only hearing held in said proceeding was held by the Assistant Secretary of War and that all notices and other acts with respect to said proceeding, the notice, and the proposed changes in said bridge were given, performed or caused to be performed, by the Assistant Secretary of War, who exercised his own discretion in said matter, contrary to the rules and regulations of the Department of War prescribing his duties.

(3) The evidence adduced did not show or tend to show that the notice of the Assistant Secretary of War bearing date March 10, 1906, was served on the defendants or on either of them, or that such notice was served on the defendants or on either of them one year next preceeding March 15, 1907, the time in which the bridge was to be altered, or that the time named was a reasonable time within which to make the alterations;

(4) The evidence adduced did not show or tend to show that the defendants or either of them had committed a misdemeanor or other offense against the law;

(5) The evidence adduced showed that in making the notice of March 10, 1906, set forth in the information, the Assistant Secretary of War acted arbitrarily and contrary to law;

(6) The evidence adduced shows that the notice of March 10, 1906, signed by the Assistant Secretary of War involved a misinterpretation of the law and was made in consequence of an error of law, because the evidence adduced affirmatively showed that the bridge was not an unreasonable obstruction to the free navigation of the river, within the meaning of the statute;

(7) The evidence adduced affirmatively showed that the Secretary of War granted a re-hearing in said proceedings in relation to the proposed changes in said bridge, and that said hearing in legal effect annulled the notice signed by the Assistant Secretary of War under date of March 10, 1906, and no notice as required by law was issued by the Secretary of War or by any one else after final action was taken by the Secretary of War in said proceedings on July 14, 1906;

(8) The order of the Secretary of War of July 14, 1906, made upon a rehearing duly granted, approved the notice of March 10, 1906, signed by the Assistant Secretary of War, only in so far as it was based upon a finding that there was difficulty in passing the draw opening or the draw span of the bridge by rafts, steamboats or other water craft, and declined to approve such notice of March 10, 1906, on the ground that the bridge was an unreasonable obstruction to the free navigation of the river.

By reason of the limitation upon the power reserved to Congress in and by the Act of July 25, 1866, to alter or amend the same, the Secretary of War could not lawfully direct or require any changes to be made in said bridge except for the purpose of preventing or removing material obstructions to the navigation of said river by the construction of said bridge, and therefore the notice of March 10, 1906, as approved by the Secretary of War, was an unlawful exercise of power by him and tended to impair the obligation of the contract contained in the Act of July 25, 1866.

The court erred in refusing to admit in evidence the order of January 17, 1893, signed by Stephen B. Elkins, Secretary of War, as follows:

“WAR DEPARTMENT,

OFFICE OF SECRETARY, *January 17, 1893.*

It appearing from the within papers that the Hannibal Bridge was constructed in the manner required by the Act of Congress authorizing the same; that there have been no serious accidents to boats at this bridge during the past ten or twelve years, that there has been no general demand by the river interests for any change in the bridge, but that there is a difference of opinion among those largely interested in the navigation of the river as to the necessity or utility of the proposed changes; that complaints made of the bridge have been based upon *ex parte* statements, and that the proposed reconstruction of the bridge would involve great expense to those owning or operating the same, without positive assurance of permanent advantage to river interests, no order will be made requiring the reconstruction or improvement of such bridge, the same not being an unreasonable obstruction to free navigation of the river.”

for the reason that said order was competent evidence to show that the bridge was constructed in accordance with the Act of July 25, 1866, and tended to show that the notice of March 10, 1906, was an unreasonable, arbitrary and unlawful exercise of power, and for the further reason that an Assistant Secretary of War cannot set aside an order made by the Secretary of War.

XVI.

The court erred in refusing to admit in evidence the certified copy of the letter dated at Rock Island, May 5, 1892, signed “A. MacKenzie, Major Corps of Engineers,” and addressed to Brig. Gen. Thomas L. Casey, Chief of Engineers, U. S. Army, wherein the writer reported at length the proceedings had in 1892 upon complaint made against the Hannibal Bridge across the Mississippi River at Hannibal, Mo., which culminated in the making of the order of January 17th 1893, by Hon. Stephen B. Elkins, Secretary of War, that the bridge was not an “Unreasonable obstruction to the free navigation” of the river and that re-construction or improvement of the same would not be ordered, for the reason that said letter was competent evidence to show that the bridge was built as required by the Act of July 25, 1866, and tended to show that the order of March 10, 1906, was an unreasonable, arbitrary and unlawful exercise of power.

XVII.

The Court erred in excluding the certified copy of the report of Brig. Gen. G. K. Warren, made in 1876, and the maps attached thereto numbered respectively 25 to 27, which report and maps described the physical conditions in the vicinity of the Hannibal Bridge across the Mississippi River at Hannibal, Mo., made report of sur-

veys; described the bridge as constructed; made report upon the influence of said bridge upon the navigation of the river; and reported the recommendations of the Board of Engineers, for the reason that said report and maps were competent evidence to show that the bridge was constructed in exact accordance with the Act of July 25, 1866, and tended to show that the notice of March 10, 1906, was an unreasonable, unlawful and arbitrary exercise of power.

XVIII.

The court erred in refusing to admit in evidence the affidavits of E. L. Corthell, H. W. Parkhurst, James Leach, A. O. Cunningham, Edward Shelah, and George E. Francisco, for the reason that said affidavits and each of them tended to show that the notice of March 10, 1906, was an unreasonable, unlawful and arbitrary exercise of power.

595

XIX.

The court erred in refusing to admit the testimony of the witness Andrew O. Cunningham as to the depth of water under the bridge between the west rest pier of the draw span thereof and the Missouri shore, for the reason that the same tended to show that there is no navigable channel between said piers for boats drawing six feet of water, and that a compliance with said notice would require the defendants to dredge and deepen and make a new or artificial navigable channel of the river between said piers.

XX.

The court erred in excluding defendants' exhibits 5, 6 and 7, respectively, which were blue prints showing among other things the depth of water at various points under the line of the Hannibal bridge, the contour of the river bed, and the soundings made by the government engineers, for the reason that said exhibits and each of them tended to show that a compliance with the notice of March 10, 1906, would require the defendants to dredge and deepen and make a new or artificial navigable channel of the river between said piers.

XXI.

The court erred in its charge to the jury in assuming that the notice of March 10, 1906, was given by the Secretary of War and that said notice described the changes that were required to be made, and in instructing the jury that the Assistant Secretary of War had a right to make the order directing the change and that the court could not supervise the propriety of any changes ordered by him, which matters were charge- in the following words:

"Evidence has been introduced in this case showing that * * * the Secretary of War directed that these changes be made in this bridge."

"It is not for me, nor for you, gentlemen of the jury, to discuss or try to determine the question of whether the changes directed

to be made in this bridge were improper or not. The Secretary of War is by this Act of Congress clothed with the authority to say whether this is an impediment to the navigation of the river or not. If you find from the evidence he has said so, by an order he has issued in this matter, and that was served upon these defendants, and they have not complied with it, and that they were in the management and control of that bridge, and failed to comply with the order made by the Secretary of War within the time that he limited them to be made, then these defendants who had charge and control of that bridge were guilty of a violation of this statute."

"If you find from the evidence in the case that the Hannibal Bridge Company and the Wabash railroad Company * * * had notice of the hearing originally had at Rock Island, Ill., and that the Secretary of War thereafter, acting upon the hearing thus had and the evidence thus presented, made an order to change the bridge, then I direct you that the failure to comply with that direction of the Secretary of War was a violation of this statute."

XXII.

The court erred in denying defendants' motion for a new trial on the grounds therein specified.

XXIII.

The court erred in denying defendants' motion in arrest of judgment on the grounds therein specified.

XXIV.

The court erred in entering judgment in favor of the plaintiff and against the defendants.

To all of which above specified actions and errors of the Court the defendants at the time duly excepted and still except.

Wherefore defendants say that the judgment should be reversed and the case dismissed.

R. BURNHAM MOFFAT,

Attorney for Defendant Hannibal Bridge Company.

WELLS H. BLODGETT,

JAS. L. MINNIS, &

GEO. A. MAHAN,

Attorneys for Defendant Wabash Railroad Company.

Endorsed: In the United States District Court, Northern Division of Eastern District of Missouri. No. 314. The United States Plaintiff *vs.* Hannibal Bridge Company, and Wabash Railroad Company, Defendants. Assignment of Errors. Filed 21st day of Oct. 1908. Geo. C. Moore, Clerk.

596

Afterwards, to-wit: on the same day the following among other proceedings were had and appear of record in said Court, to-wit:

314.

THE UNITED STATES, Plaintiff,

*vs.*THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD
COMPANY, Defendants.

Now, at this day come the defendants herein, by their Attorneys, A. Burnham Moffat, Wells H. Blodgett, Jas. L. Minnis and Geo. A. Mahan, Esq., and file Petition for Writ of Error in the above entitled cause.

Which said Petition for Writ of Error is in words and figures, as follows, to-wit:

In the District Court of the United States for the Northern Division
of the Eastern District of Missouri.

THE UNITED STATES, Plaintiff,

*vs.*HANNIBAL BRIDGE COMPANY and WABASH RAILROAD COMPANY,
Defendants.*Petition for Writ of Error.*

Now comes the Hannibal Bridge Company, and the Wabash Railroad Company, defendants herein and say that on or about the 29th day of May, 1908, this Court on a verdict rendered, entered judgment herein in favor of the plaintiff, and against the defendants, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice and injury of the defendants, all of which will appear more in detail from the assignment of errors which is filed in this cause with this petition.

Wherefore defendants pray that a writ of error may issue in this behalf to the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the said Supreme Court of the United States.

R. BURNHAM MOFFAT,

Attorney for Defendant Hannibal Bridge Company.

WELLS H. BLODGETT,

JAS. L. MINNIS, &

GEO. A. MAHAN,

Attorneys for Defendant Wabash Railroad Company.

Endorsed: In the United States District Court, Northern Division of Eastern District of Missouri. No. 314. The United States Plaintiff *vs.* Hannibal Bridge Company, and Wabash Railroad Company, Defendants. Petition for Writ of Error. Filed 21st day of Oct. 1908. Geo. C. Moore, Clerk.

Afterwards, to-wit: on the 2nd day of November, A. D. 1908, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD COMPANY, Defendants.

Now at this day the Writ of Error issued herein is returned and filed.

597 Endorsed: to wit: No. 314. United States District Court, Northern Division of the Eastern Judicial District of Missouri. The Hannibal Bridge Company and The Wabash Railroad Company, Plaintiffs in Error, *vs.* The United States, Defendant in Error. Writ of Error. To the Supreme Court of the United States at Washington, D. C. Returned and filed, 2nd day of Nov., 1908. Geo. C. Moore, Clerk.

Afterwards, to-wit: on the same day the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD COMPANY, Defendants.

Now at this day the Citation issued herein, is returned and filed.

Afterwards, to-wit: on the 10th day of November, 1908, the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD COMPANY, Defendants.

Now at this day, comes the defendant, The Hannibal Bridge Company, and files Writ of Error Bond, in the sum of Ten Thousand (\$10,000.00) Dollars, with the Fidelity and Deposit Company of Maryland, as Surety.

Which said Writ of Error Bond of Defendant Hannibal Bridge Company, is in words and figures, as follows, to-wit:

598 UNITED STATES OF AMERICA.
Eastern District of Missouri, ss:

Know All Men by These Presents: That we, Hannibal Bridge Company, a corporation of the State of Missouri, principal, and the Fidelity and Deposit Company of Maryland, surety, are held and firmly bound unto the United States of America in the full and just sum of ten thousand dollars (\$10,000.), to be paid to said United States of America, for which payment well and truly to be made we bind ourselves, our and each of our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd day of November, nineteen hundred and eight.

Whereas, lately at a District Court of the United States in and for the Northern Division of the Eastern District of Missouri, in an action depending in said court wherein the United States of America was plaintiff and the Hannibal Bridge Company, impleaded with others, was defendant, a judgment was rendered by said court on the 29th day of May, 1908 (sentencing the Hannibal Bridge Company to pay to the United States of America two fines of two thousand five hundred dollars (\$2500) each, aggregating a total of five thousand dollars (\$5000) and said Hannibal Bridge Company having obtained a writ of error and being about to file a copy thereof in the clerk's office of said court to reverse the judgment in said action, and a citation directed to the United States of America, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden in the City of Washington on the fourth Monday of November 1908.

Now the condition of this obligation is such that if the Hannibal Bridge Company shall appear and surrender itself in and to the District Court of the United States for the Northern Division of the

599 Eastern District of Missouri on and after the filing in said District Court of the mandate of the Supreme Court of the United States and from time to time thereafter as it may be required to answer any further proceedings, and abide by and perform any judgment or order which may be had or rendered therein in the case, and shall abide by and perform any judgment or order which may be rendered in said Supreme Court of the United States, and not depart from said District Court without leave thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands and seals the day and year first above written.

(Signed)

HANNIBAL BRIDGE COMPANY.

[SEAL.]

By ALBERT T. WHITE, *President*.

Attest:

GEORGE DUVAL, *Secretary*.

FIDELITY & DEPOSIT COMPANY
 OF MARYLAND.

[SEAL.]

By ROBT. L. McLARAN,

Resident Vice President.

Attest:

C. J. McLARAN,

Resident Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of November, 1908, before me personally came Alfred T. White, to me known, who, being by me duly sworn did depose and say that he resided in the Borough of Brooklyn, City and State of New York; that he is the president of the Hannibal Bridge Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal, that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order.

WILLIAM I. FROTHINGHAM,
Notary Public, Kings County.

Certificate filed in New York County.

600 STATE OF MISSOURI,
City of St. Louis, ss:

On this 6th day of November, 1908, before me appeared Robt. L. McLaran, to me personally known, who being by me first duly sworn, did say that he is resident vice-president of the Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation; and that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors and the said Robt. L. McLaran acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof, I have hereunto set my hand and notarial seal, the day and year first above written. My term expires May 23, 1909.

[NOTARIAL SEAL.]

LENA E. BAER,
Notary Public, City of St. Louis, Mo.

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, clerk of the county of New York and also clerk of the Supreme Court for the same County, the same being a court of record, do hereby certify that William I. Frothingham has filed in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument, duly authorized to take the same. And further that I am well acquainted with the hand writing of such notary, and believe the signature to the said certificate of proof or acknowledgment to be genuine.

601 In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County the 4th day of Nov. 1908.

[SEAL.]

PETER J. DOOLING, *Clerk.*

Approved:

DAVID P. DYER, *Judge.*

Endorsed as follows: No. 314. Writ of Errors Bond. Hannibal Bridge Co. United States of America *vs.* Hannibal Bridge Company, and Wabash Railroad Company. Filed Nov. 10, 1908. Geo. C. Moore, Clerk.

602 Afterwards, to-wit: on the same day (10th day of November, 1908), the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD COMPANY, Defendants.

Now at this day, comes the Defendant, The Wabash Railroad Company, and files Writ of Error Bond in the sum of Ten Thousand (\$10,000.00) Dollars, With the United States Fidelity and Guaranty Company, as Surety.

Which said Writ of Error Bond of Defendant, Wabash Railroad Company, is in words and figures, as follows, to-wit:

603 In the District Court of the United States for the Northern Division of the Eastern District of Missouri.

UNITED STATES, Plaintiff,

vs.

HANNIBAL BRIDGE COMPANY and WABASH RAILROAD COMPANY, Defendants.

Bond on Writ of Error.

Know all men by these presents, that we, The Wabash Railroad Company, as principal, and The United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto the plaintiff, the United States, in the full and just sum of ten thousand dollars to be paid to the said plaintiff, the United States, its certain attorneys or assigns: to which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents. Sealed with our seals, and dated this 7th day of November, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a District Court of the United States for the Northern Division of the Eastern District of Missouri, in a suit depending in said court, between United States, plaintiff, and Hannibal Bridge Company and Wabash Railroad Company, defendants, a judgment was rendered against the said Hannibal Bridge Company and Wabash Railroad Company, and the said Hannibal Bridge Company and Wabash Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed

to the said United States citing and admonishing it to be and appear at a session of the United States Supreme Court to be holden at the City of Washington, on the 23rd day of November, 1908.

Now the condition of the above obligation is such that if the said Wabash Railroad Company, shall prosecute said writ of error to effect and answer all damages, fine and costs if they fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

(Signed) THE WABASH RAILROAD COMPANY,
 [SEAL.] By E. B. PRYOR, *Vice-President*,
 THE UNITED STATES FIDELITY AND
 GUARANTY CO.,
 [SEAL.] By CHAS. W. DISBROW, *Its Attorney in Fact*.

STATE OF MISSOURI,

City of St. Louis, ss:

On this 7th day of November, 1908, before me, a Notary Public of the City of St. Louis in the State of Missouri, came E. B. Pryor, vice president of the Wabash Railroad Company, to me personally known to be the individual and officer described in and who executed the preceding instrument and acknowledged the execution of the same, and being duly sworn says that he is the said officer of the said Company, and that the seal affixed to the preceding instrument is the corporate seal of the said Company, and that said corporate seal and his signature as such officer was duly affixed and subscribed to said instrument by authority and direction of the said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal, at the City of St. Louis the day and year first above written. My term expires July 13, 1912.

[SEAL.] (Signed) LILLIAN F. BOXVILLE,
Notary Public.

Approved:

DAVID P. DYER, *Judge.*

Endorsed as follows: No. 314, United States of America, *vs.* Hannibal Bridge Company, and Wabash Railroad Company. Writ of errors Bond. Wabash Railroad Co. Filed: Nov. 10, 1908. Geo. C. Moore, Clerk.

605 Afterwards, to-wit: on the same day, (10th day of November, 1908) the following among other proceedings were had and appear of Record in said Court, to-wit:

314.

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD
COMPANY, Defendants.

Now at this day comes the defendant, The Hannibal Bridge Company, and files Cost Bond, in the sum of Five Hundred (\$500.00) Dollars, with A. R. Levering and Geo. A. Mahan, as Sureties.

Which said Cost Bond of Defendant Hannibal Bridge Company, is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA.

*Northern Division of the Eastern District of Missouri, ss:**Bond.*

Know all men by these presents that we, Hannibal Bridge Company, as principal, and A. R. Levering & Geo. A. Mahan, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Five Hundred Dollars to be paid to the said United States of America, its certain Attorneys or assigns: to which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents. Sealed with our seals, and dated this 7th day of November, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a District Court of the United States for the Northern Division of the Eastern District of Missouri, upon an information or proceeding filed in said Court, wherein the United States of America was plaintiff and the Hannibal Bridge Company and Wabash Railroad Company were defendants, the Hannibal Bridge Company was by said Court on the 29th day of May, 1908, convicted and a judgment rendered sentencing said Company to pay to the United States of America, two fines of Twenty-five Hundred Dollars each, and said

Company having obtained a writ of error and filed a copy thereof in the Clerk's office of said Court to reverse said judgment and conviction and a citation directed to the United States of America citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden in the City of Washington, on the fourth Monday of November, 1908.

Now the condition of this obligation is such that if the Hannibal Bridge Company which has been so convicted under such information or proceeding, shall prosecute said writ of error and pay all costs that may accrue and be adjudged against it, then this obligation to be void, otherwise to remain in full force and virtue.

606

HANNIBAL BRIDGE COMPANY.
By A. R. LEVERING,

Director and Agent.

GEO. A. MAHAN.
A. R. LEVERING.

Approved

DAVID P. DYER, *Judge.*

Endorsed: No. 314. United States of America, *vs.* Hannibal Bridge Company, and Wabash Railroad Company. Cost Bond of Hannibal Bridge Company. Filed Nov. 10, 1908. Geo. C. Moore, Clerk.

Afterwards, to-wit: on the same day (10th day of November, 1908) the following among other proceedings were had and appear of record in said Court, to-wit:

314.

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE HANNIBAL BRIDGE COMPANY and THE WABASH RAILROAD COMPANY, Defendants.

Now at this day comes, defendant The Wabash Railroad Company, and files cost Bond in the sum of Five Hundred (\$500.00) Dollars, with A. R. Levering and Geo. A. Mahan, as Sureties.

Which said Cost Bond of Defendant Wabash Railroad Company, is in words and figures as follows, to-wit:

Bond.

UNITED STATES OF AMERICA,

Northern Division of the Eastern District of Missouri, ss:

Know all men by these presents that we, The Wabash Railroad Company, as principal, and A. R. Levering Geo. A. Mahan, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Five Hundred Dollars to be paid to the said United States of America, its certain attorneys or assigns: to which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents. Sealed with our seals, and dated this 7th day of November, in the year of our Lord one Thousand nine hundred and eight.

Whereas, lately at a District Court of the United States for the Northern Division of the Eastern District of Missouri, upon 607 an information or proceeding filed in said court, wherein the United States of America was plaintiff and the Hannibal Bridge Company and Wabash Railroad Company were defendants, the Wabash Railroad Company was by said court on the 29th day of May, 1908, convicted and a judgment rendered sentencing said Company to pay to the United States of America, two fines of Twenty-five Hundred Dollars each, and said Wabash Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's office of said court to reverse said judgment and conviction and a citation directed to the United States of America citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden in the City of Washington, on the fourth Monday of November, 1908.

Now the condition of this obligation is such that if the Wabash Railroad Company which has been so convicted under such information or proceeding, shall prosecute said writ of error and pay all costs that may accrue and be adjudged against it, then this obligation to be void, otherwise to remain in full force and virtue.

WABASH RAILROAD COMPANY,
By GEO. A. MAHAN, *Its Agent & Atty.*
A. R. LEVERING,
GEO. A. MAHAN.

Approved
DAVID P. DYER, *Judge.*

Endorsed: No. 314. United States of America, *vs.* Hannibal Bridge Company, and Wabash Railroad Company. Cost Bond of Wabash Railroad Company. Filed Nov. 10, 1908. Geo. C. Moore.

508 THE UNITED STATES OF AMERICA:

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the Fourth Monday of November, 1908, next, pursuant to a writ of error, filed in the Clerk's office of the District Court of the United States for the Northern Division of the Eastern Judicial District of Missouri, wherein The Hannibal Bridge Company, and The Wabash Railroad Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David P. Dyer, Judge of the District Court of the United States for the Eastern District of Missouri, this 31st day of October in the year of our Lord one thousand nine hundred and eight.

DAVID P. DYER,
Judge United States District Court,
Eastern District of Missouri.

THE UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I do hereby certify that at the City of St. Louis, Missouri, in the Eastern District of Missouri, on the 31st day of October, A. D., 1908, I served this citation or writ on The United States of America, by delivering a copy thereof to Henry W. Blodgett, the District Attorney for the United States for the Eastern District of Missouri.

1 service \$2.00.

WM. L. MORSEY,
U. S. Marshal,
By O. A. KNEHAN, *Deputy.*

[Endorsed:] United States District Court, Northern Division of the Eastern Judicial District of Missouri. The Hannibal Bridge Company, and The Wabash Railroad Company, plaintiffs in Error, vs. The United States, Defendant in error. Citation. Filed Nov. 2nd, 1908. Geo. C. Moore, clerk.

609 UNITED STATES OF AMERICA, 88:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Northern Division of the Eastern Judicial District of Missouri, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the May Term, 1908, thereof, between The United States, Defendant in Error, and The Hannibal Bridge Company, and The Wabash Railroad Company, Plaintiffs in Error, a manifest error hath happened, to the great damage of the said The Hannibal Bridge Company, and The Wabash Railroad Company, Plaintiffs in Error, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington, D. C., on the Fourth Monday of November, 1908 next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21st day of October in the year of our Lord one thousand nine hundred and eight.

Issued at office in the City of Hannibal, with the seal of the District Court of the United States for the Northern Division of the Eastern Judicial District of Missouri, dated as aforesaid.

[Seal of the United States District Court, Northern Division of the Eastern Judicial District of Missouri.]

GEO. C. MOORE,

*Clerk District Court United States, Northern Division
of the Eastern Judicial District of Missouri.*

By ———, *Deputy.*

Allowed by
DAVID P. DYER, *Judge.*

The writ of Error is allowed as prayed and the defendants are ordered to give bond during the pendency of the cause in the sum of \$10,000 each. And it is further ordered that writ be a supercedas of any execution upon the judgments heretofore pending these proceedings.

DAVID P. DYER, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA,
Northern Division of the Eastern
Judicial District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said District Court, at office in the City of Hannibal, this 11th day of November A. D. 1908.

[Seal of the United States District Court, Northern Division
of the Eastern Judicial District of Missouri.]

GEO. C. MOORE,
Clerk of said Court.

[Endorsed:] No. 314. United States District Court, Northern Division of the Eastern Judicial District of Missouri. The Hannibal Bridge Company and The Wabash Railroad Company, Plaintiffs in Error, *vs.* The United States, Defendant in Error. Writ of Error. To the Supreme Court of the United States, at Washington, D. C. Returned and Filed, 2nd day of Nov., 1908. Geo. C. Moore, Clerk.

611 UNITED STATES OF AMERICA,
Northern Division of the Eastern
Judicial District of Missouri, ss:

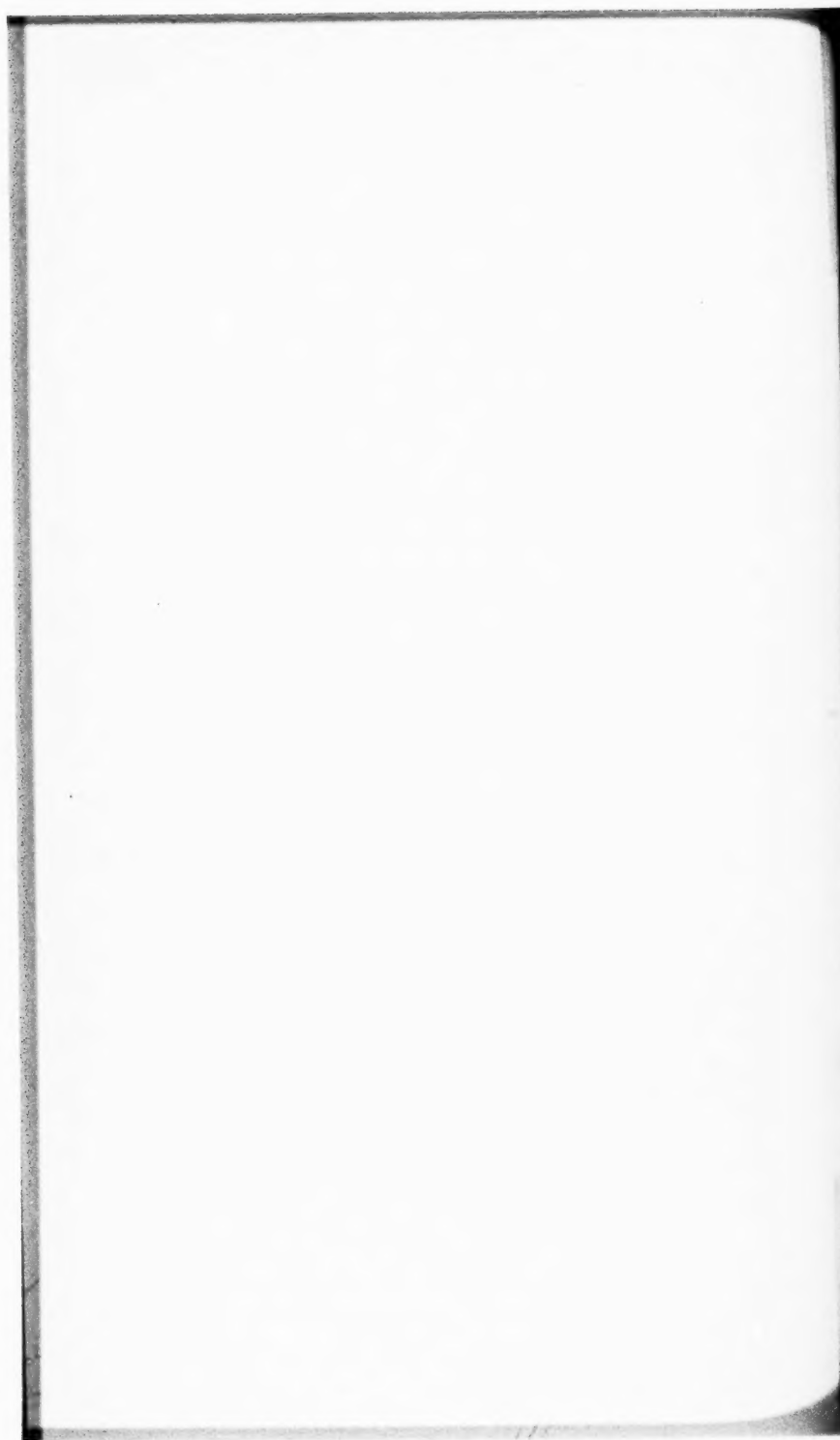
I, George C. Moore, Clerk of the District Court of the United States, in and for the Northern Division of the Eastern Judicial District of Missouri, do hereby certify the writing hereto attached to be a true, full and complete transcript of all the record and proceedings had in Case No. 314 of United States of America, Plaintiff, against The Hannibal Bridge Company, and The Wabash Railroad Company, Defendants, as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court, at office in the city of Hannibal, in the Northern Division of said District this Tenth day of November in the year of our Lord, nineteen hundred and Eight.

[Seal of the United States District Court, Northern Division
of the Eastern Judicial District of Missouri.]

GEO. C. MOORE,
Clerk of said Court,
By ———, *Deputy.*

Endorsed on cover: File No. 21,416. E. Missouri D. C. U. S. Term No. 294. The Hannibal Bridge Company and The Wabash Railroad Company, plaintiffs in error, *vs.* The United States. Filed November 17th, 1908. File No. 21,416.



Office Supreme Court U. S.

FILED

JAN 19 1911

JAMES H. McKENNEY,

Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1909

THE HANNIBAL BRIDGE COMPANY, and
THE WABASH RAILROAD COMPANY,

Plaintiffs in Error,

VS.

THE UNITED STATES,

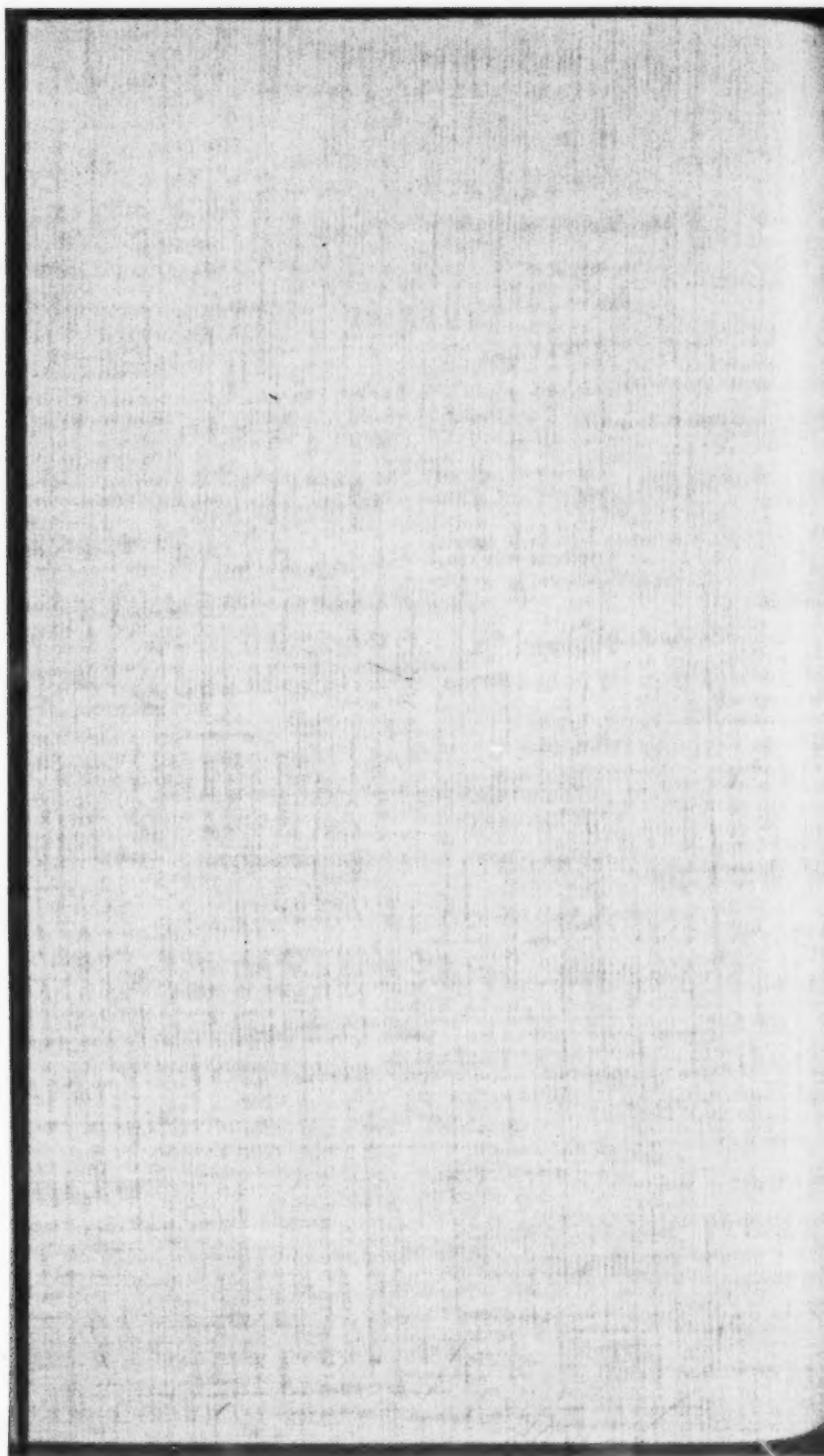
Defendant in Error.

No. 100.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF MISSOURI.

WELLS H. BLODGETT,
JAMES L. MINNIS,
GEORGE A. MAHAN,

Counsel for Wabash Railroad Company,
Plaintiff in Error.



Supreme Court of the United States.

OCTOBER TERM, 1909

THE HANNIBAL BRIDGE COMPANY, and
THE WABASH RAILROAD COMPANY,

Plaintiffs in Error,

vs.

THE UNITED STATES,

Defendant in Error.

No. 294.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF MISSOURI.

I.

GENERAL STATEMENT OF THE CASE, INCLUDING FORMER REPORTS AND FINDINGS RESPECTING THE BRIDGE.

This is a criminal information, prosecuted under Section 18 of the Act of Congress of March 3, 1899, for failing to obey an order made by the Assistant Secretary of War, requiring certain changes to be made in the bridge over the Mississippi River at Hannibal.*

The proceeding is against the Hannibal Bridge Company, as owner, and The Wabash Railroad Company, as lessee in possession of the bridge.

*Note: See Appendix A, p. 86, for copy of Information.

**BRIDGE ERECTED UNDER SPECIAL ACT OF
JULY 25th, 1866.**

It appears from the Record (page 114) that the bridge was completed in 1871, and it is charged in the information that it was erected under the provisions of a **Special Act** of Congress, approved July 25, 1866.*

The Special Act was put in evidence by the Government, and will be found in the printed Record, commencing at page 70.

It is entitled "**An Act to authorize the construction of certain bridges and to establish them as post roads.**"

Section One provides: "That it shall be lawful for any person or persons, company or corporation having authority from the States of Illinois and Missouri for such purpose, to build a bridge across the Mississippi River at Quincy, Ill., and to lay on and over said bridge railway tracks for the more perfect connection of any railroads that are or shall be constructed to said River at or opposite said point, and that when constructed all trains of all roads terminating at said River, or opposite said point, shall be allowed to cross said bridge for reasonable compensation to be made to the owners of said bridge under the limitations and conditions hereinafter provided."

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Section Two provides: "That if any bridge built under this Act shall be constructed as a draw-bridge the same shall be constructed as a pivot draw-bridge, with draw over main channel of the River at an accessible and navigable point, and that spans of not less than 160 feet in length in the clear on each side of the central or pivot pier of the draw; and the next adjoining spans to the draw shall not be less than 250 feet; and said spans shall not be less than 30 feet above low-

*See Appendix B, p. 102, for copy of Act of 1866

water mark and not less than 10 feet above extreme high-water mark, measuring to the bottom cord of the bridge, and the piers of said bridge shall be parallel to the current of the River.”

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Section Three provides: “That any bridge constructed under this Act and according to its limitations shall be a lawful structure, and shall be recognized and known as a post road,” etc.

Section Five provides: “That a bridge may be constructed at the Town of Hannibal, in the State of Missouri, across the Mississippi River so as to connect the Hannibal and St. Joseph Railroad with the Pike County and Great Western Railroads of Illinois on the same terms and subject to the same restrictions contained in this Act for the construction of the bridge at Quincy, Illinois.”

Sections 6, 7, 8, 9, 10, 11 and 12 relate to the erection of bridges at other points on the River, and need not be noticed in this connection.

POWER TO REQUIRE ALTERATIONS WAS RESERVED TO CONGRESS.

Section Thirteen of the Act provides: “That the right to alter or amend this Act so as to prevent or remove all material obstructions to the navigation of said River by the construction of bridges is hereby reserved.”

THE BRIDGE WAS CONSTRUCTED AS PROVIDED IN ACT OF CONGRESS.

At no time prior to the date of the order made by the Assistant Secretary of War, as set out in the information, were the defendants ever called upon to meet any charge that the bridge was not constructed

in every particular in accordance with said Act of Congress.

But, on the other hand, at the trial in the District Court, the Government put in evidence certified copies of official documents from which it appeared that in 1893 there had been a specific finding by the Secretary of War: "That the bridge had been constructed in the manner required by the Act of Congress authorizing its erection, * * * and that it **was not** an unreasonable obstruction to the free navigation of the River."

That finding and order of the Secretary of War will be found on page 84 of printed Record, and is as follows:

WAR DEPARTMENT.

Office of the Secretary,

WASHINGTON, JAN. 17, 1893.

"It appearing from the within papers that the Hannibal Bridge was constructed in the manner required by the Act of Congress authorizing the same; that there have been no serious accidents to boats at this bridge during the past ten or twelve years; that there has been no general demand by the river interests for any change in the bridge, but that there is a difference of opinion among those largely interested in the navigation of the river as to the necessity or utility of the proposed changes; that complaints made of the bridge have been based upon **ex parte** statements, and that the proposed reconstruction of the bridge would involve a great expense to those owning or operating the same, without positive assurance of permanent advantage to river interests; no order will be made requiring the reconstruction or improvement of such bridge, the same not being an 'unreasonable obstruction to the free navigation' of the river.

S. B. ELKINS,

Secretary of War."

There is also found in the Record (commencing at page 262) a certified copy of a report made May 5th, 1892, by Major Mackenzie (since Chief of Engineers) to General Casey (then Chief of Engineers), in which the following statement is made respecting the lawful character of the bridge (pages 264 and 265):

“While it is a simple matter to present the facts relating to the difficulties experienced by the interests of navigation in passing through the Hannibal Bridge, and to suggest the only plan which appears to be a practical one for overcoming these difficulties, it is more difficult to make recommendations as to how such changes of plan can be properly secured.

The Wabash Railroad Company does not own the Hannibal Bridge, but leases and operates it under conditions which would bring upon them the burden of any changes, which, under the law, devolves upon bridge companies.

The Wabash Railroad Company make the claim that the Hannibal Bridge was built in exact accordance with the Act of Congress, approved July 25, 1866. That such law compelled the Bridge Company to place the draw-openings out in the stream and construct a raft span between such draw-openings and the Missouri shore; and that the difficulties which now exist, as result of the location of such draw, are the fault of the law and not of the Bridge Company. That the concentration of the River and excessive current at high stages result from the construction of the Sny Carte Levee, for which they are in no way responsible. That the Act authorizing the construction of the Hannibal Bridge expressly reserved to Congress the right to require alterations or changes; and that, even conceding the present structure to be an unnecessary obstruction, it is nevertheless, as it stands, a legal structure, but that if changed, even for the betterment of navigation, without the action of Congress, the bridge would be an illegal structure. That the law of

September 19, 1890, authorizing the Secretary of War to order alterations in bridges, did not contemplate such a radical alteration as a change of location of draw.

The claims that the bridge was built in accordance with the law of July 25, 1866, that the present difficulties are partially, at least, due to the requirements of the law, and that the construction of the Sny Carte Levee is responsible for much of the trouble are undoubtedly correct.”*

**GENERAL WARREN'S REPORT ON THE BRIDGE
SHOWS THAT IT WAS CONSTRUCTED EX-
ACTLY AS REQUIRED BY THE SPECIAL
ACT OF JULY 25TH, 1866.**

The defendants also offered in evidence a certified copy of that portion of a report descriptive of the Hannibal Bridge, made in 1876 by General W. K. Warren to the Secretary of War, in pursuance of an Act of Congress. The report will be found in the Record, commencing at page 268, and is designated as “Defendants’ Exhibit No. 3.” That part of the report to which we now direct the attention of the Court is (page 269) as follows:

“Description of the Bridge.

(See Diagram.)

“On the Missouri side the bridge is approached through a short tunnel on a $9\frac{1}{2}$ degree curve, to which the bridge axis is tangent. The line of the bridge is at right angles with the general course of the River. The spans of the bridge commencing at the Missouri side are, first, one 250 feet from centers of piers; then a draw span 360 feet over all, giving two clear openings of 160 feet; then one span 250 feet, and four of 180 feet each, making the total length of the bridge 1,580 feet.”*

*Note: Heavy faced type is ours.

*Note: Black-faced type is ours.

The report of General Warren was (page 268) excluded as evidence by the Court, to which ruling the defendants at the time excepted.

**NO CHANGE IN BRIDGE SINCE THE FINDINGS
OF ENGINEERS AND SECRETARY OF
WAR, ABOVE QUOTED.**

It appears from the Record that while the present order requiring changes to be made in the bridge was being considered the papers in the case were referred to Major James L. Lusk, of the Corps of Engineers, and that on February 1st, 1905 (Record, page 83), he submitted his report to the Chief of Engineers. In paragraph 5 of his report (Record, p. 84) he has quoted in full the finding and order of the Secretary of War, dated January 17th, 1893, and then in the sixth paragraph of his report he stated (page 84) as follows:

“6. Since the above quoted action of the War Department, in 1893, conditions are believed to have not greatly altered at this bridge, the only actual changes being those considered to be due to the deposit of rip-rap from time to time about some of the piers and abutments. It is possible that the unfavorable conditions at this bridge may be somewhat aggravated at future high stages by increased velocities due to the recent construction by private interests of a line of levee on the right (or Missouri) bank of the river, above the bridge. This levee extends down stream from the mouth of the South River, leaving the immediate bank of the river at a point some distance above the bridge.”

The trouble, if any now exists, is caused by the legislation of Congress, and not through any fault in the construction of the bridge.

The Record also shows that in the course of this proceeding the papers in the case were before the Judge

Advocate General of the Army, and that in his report (page 144 of Record) he states as follows:

“While there is considerable doubt as to whether the bridge, as constructed, is ‘an unreasonable obstruction to the free navigation of such waters,’ for any of the reasons stated, I think it is established in evidence that ‘there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft,’ and that, for that reason, the order directing alterations was properly issued.

It is proper to observe, also, that the difficulty of passing the bridge, at high stages of water, has been added to by Congress in authorizing the construction of the Sny Levee on the left bank of the river, a short distance above the bridge; the operation of the levee being to reduce the width of the river at high water, and cause a considerable volume of water to pass under the bridge, which formerly overflowed on the Illinois side. This consideration, whatever force may be assigned to it in the determination of the question involved, makes in favor of, or operates to diminish the liability of the Bridge Company.”*

II.

STATEMENT OF PROCEEDINGS OF WAR DEPARTMENT ON WHICH WAS BASED THE PRESENT ORDER REQUIRING CHANGES IN THE BRIDGE.

1. The Record (page 79) shows that on January 2d, 1905, one John Killeen, of Dubuque, Iowa, addressed a letter to the Secretary of War, in which he charged that the Hannibal Bridge was a dangerous obstruction to the free navigation of the Mississippi River. The letter of Killeen was accompanied by letters from other

*Note: Heavy-faced type is ours.

parties, who made statements to the same effect as his own.

2. The Record (page 82) shows that on January 7th, 1905, the letter of Killeen, with those accompanying it, were referred by General Mackenzie, Chief of Engineers, to Major J. L. Lusk, of the Corps of Engineers, for report.

3. The Record (page 83) shows that on February 1st, 1905, Major Lusk submitted to General Mackenzie, Chief of Engineers, his report respecting the complaints against the Hannibal Bridge. In paragraph 3 of that report Major Lusk stated as follows:

“In 1892, Major (now General) A. Mackenzie, Corps of Engineers, fully investigated this matter, and after due public hearings reported that in his opinion the following changes were necessary in the interest of safe navigation:

‘The west draw-pier (first pier from Missouri shore) is to be converted into a pivot-pier; a new west draw-rest pier is to be constructed near the Missouri shore; the present pivot-pier is to be cut down and converted into a east draw-rest pier; the present draw-span is to be moved west; new and solid long or protection piers of crib work are to be built above and below the new pivot-pier; and proper guard fences are to be built along the Missouri shore above and below the new shore-pier.

Each of the draw-openings on the new location of draw-span is to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

The new and remodeled piers are to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible is to be given between all new and remodeled piers.’ ”

Then follows (pages 84 and 85 of Record) a state-

ment of the changes in the bridge which he (Major Lusk) considered necessary, which changes were the same as those **above quoted** by him as having been recommended by Major (now General) Mackenzie in 1892.

4. The Record shows (page 86) that General Mackenzie, Chief of Engineers, on February 8th, 1905, returned the letter of John Killeen, together with the above report of Major Lusk, to the Secretary of War, with a statement that he (General Mackenzie) concurred in the views of Major Lusk, and recommended that the papers be returned to Major Lusk with instructions to hold a **public hearing** "as required by law and the orders of the War Department."

5. The Record shows (page 113) that on February 9th, 1905, the recommendations of the Chief of Engineers, General Mackenzie, were approved by Robert Shaw Oliver, as Assistant Secretary of War.

6. The Record shows (page 114) that on February 13th, 1905, the papers were returned to Major Lusk, with instructions to proceed with a public hearing as recommended by General Mackenzie, Chief of Engineers.

Notice of Hearing Served on Defendants.

The Record shows (pages 87 to 96) that in the month of May, 1905, there were served on the attorneys and executive officers of the Hannibal Bridge Company and the Wabash Railroad Company, notices, all of which were in the following form, except as to the persons addressed:

"To Geo. A. Mahan, Attorney, Hannibal Bridge Company:

"Whereas, the Secretary of War has good reason to believe that the bridge over the Mississippi

River at Hannibal, Mo., commonly known as the Wabash Railway Bridge, is an unreasonable obstruction to the free navigation of the Mississippi River on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers.

It is proposed to require the following changes to be made in said bridge by the first day of July, 1906, to-wit: As per attached slip:

'The west draw-pier (first pier from Missouri shore) to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot-pier; and proper guard fences to be built along the Missouri shore above and below the new shore pier.

'Each of the draw openings on the new location of draw-span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

'The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers.'

In order to give you an opportunity to be heard, as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, in Room 28, at U. S. Engineer Office, Post Office Bldg., 16th St. and 2d Ave., in Rock Island, Ill., at 10 o'clock a. m. on the sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all papers will be laid before the Secretary of War for his decision, it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War.

C. S. Riche,

Major, Corps of Engineers."

CIRCULARS SENT OUT.

The Record shows (page 151) that Major Lusk thereupon sent out from his office at Rock Island, in March, 1905, a circular accompanied by a series of interrogatories to a large number of persons. These circulars and letters were all in the same form except as to the persons addressed:

"FORM OF CIRCULAR.

"U. S. Engineer Office.

Rock Island, Ill., March 25th, 1905.

"Dear Sir: There have been referred to this office for action several petitions, addressed to the Secretary of War, and signed by vessel owners, masters, pilots and others interested in the navigation of the Upper Mississippi River. These petitions set forth that the bridge over the Mississippi River at Hannibal, Missouri, in its present condition, is an unreasonable obstruction to the free navigation of the said river, by reason of the location of the existing draw-openings, the absence of guard fences or sheer booms, and the presence of artificial deposits of stone about the piers. The petitions request the Secretary of War, under the authority vested in him by law, and after a due hearing of all interested persons or corporations, to require such alterations to be made in and about the said bridge as will render navigation through it reasonably free, easy and unobstructed.

From the records of former hearings and inquiries in regard to this bridge, it appears to be the prevailing opinions of navigators that the following changes in the Hannibal Bridge are necessary to afford suitable relief to navigation:

'The west draw-pier (first pier from Missouri shore) to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers of crib-work to be

built above and below the new pivot-pier; and proper guard fences to be built along the Missouri shore above and below the new shore-pier.

‘Each of the draw-openings on the new location of draw-span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

‘The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers.’

Such changes in the Hannibal Bridge as those described above are important, and to secure them Congressional action may be required. It is therefore necessary that the presentation of the matter be made full and complete. To secure the needful information on this subject, I would ask for replies to the following questions, and also for such additional remarks as you may be willing to make.

Jas. L. Lusk,

Major, Corps of Engineers.”

“FORM OF INTERROGATORIES.

“Sir: 1. Do your duties now, or have they in former years, require you to run boats, or tows, or rafts through the Hannibal Bridge, and are you familiar with the difficulties of navigation at that point?

2. Do you consider the Hannibal Bridge in its present condition an unreasonable obstruction to navigation, and, if so, why?

3. What do you consider the best plan for making the passage of Hannibal Bridge more safe and convenient for all classes of navigation?

4. Are you in favor of moving the draw to the west so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below, the shore draw opening?

5. Do you consider the Hannibal Bridge the most dangerous of the Upper Mississippi River bridges?

6. What examples are there within your knowledge of loss or damage resulting from collisions or delays due to the Hannibal Bridge? These facts are desired in order that the amount of loss may be approximately estimated.

7. Can you give other facts having a bearing on the question?"

PROCEEDINGS HAD AT THE SO-CALLED HEARING AT ROCK ISLAND, JUNE 6th, 1905.

The Record shows (page 149) that in pursuance of the above mentioned notices what is called a "hearing" was held at Rock Island, Illinois, on the 6th day of June, 1905, at which Major C. S. Riche presided.

It will be observed (page 151) that in opening the proceedings Major Riche referred to the circular and the letters sent out by Major Lusk to various parties before the meeting was called.

Major Riche then proceeded to read the unverified replies received from the several parties to whom the circular letters and interrogatories had been addressed. These replies will be found in the Record, commencing on page 160 and ending at page 201. There was also read at the hearing some *ex parte* affidavits that will be found in the Record, commencing at page 202 and ending at page 234.

No Opportunity Given for the Cross-Examination of Witnesses.

No oath was administered to any one of the twenty-six persons who replied to the interrogatories propounded by Major Lusk; no oath was administered to anyone at the "hearing," nor were any of the persons whose affidavits were read present at the "hearing" for cross-examination.

MAJOR RICHE MAKES REPORT TO CHIEF OF ENGINEERS.

The Record shows (page 110) that on the 13th of January, 1906, Major Riche made report of his "hearing" at Rock Island to General Mackenzie, Chief of Engineers, which report concluded (Record, p. 113) as follows:

"I therefore have the honor to recommend that the following alterations in this bridge be ordered:

The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot-pier; a new draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers of crib-work to be built above and below the new pivot-pier, the existing cribs and crib-piers to be removed and proper guard-fences to be built along the Missouri shore above and below the new shore-pier.

Each of the draw openings on the new location of draw-span to give at all stages of the river a clear width of waterway of not less than 160 feet, available for boats drawing 6 feet of water.

The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers.

The work to be done without interruption to navigation and under the supervision of the Engineer Officer in charge of the locality.

One year from date of giving such order should be allowed as a reasonable time in which to make the required alterations."

CHIEF OF ENGINEERS REPORTS TO SECRETARY OF WAR.

The Record shows (page 114) that on March 12th General Mackenzie forwarded to the Secretary of War

the report of Major Riche, with a recommendation "that notices be issued to the proper officials of the companies owning or operating the bridge, requiring the changes to be made as specified in the above quoted report of Major Riche."

**ASSISTANT SECRETARY OF WAR NOTIFIES
DEFENDANTS OF CHANGES REQUIRED
IN BRIDGE.**

The Record shows (page 128) that on the 10th day of March, 1906, the Assistant Secretary of War issued notices to the several defendants, respecting changes to be made in bridge, all of which notices were in form as follows, excepting as to parties addressed:

"WAR DEPARTMENT.

Washington City, March 10, 1906.

To The Hannibal Bridge Company:

Take notice that:

Whereas, the Secretary of War has good reason to believe that the draw bridge, commonly known as the Wabash Railway Bridge, owned or operated by the Hannibal Bridge Company, *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable waterways of the United States) on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers; there being difficulty in passing the draw openings or draw spans of such bridge by rafts, steamboats and other water craft;

And, Whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably safe, easy and unobstructed, to wit:

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot-pier;

a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers of crib work to be built above and below the new pivot-pier; the existing cribs and crib-piers to be removed and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the new draw openings on the new location of draw-span to give at all stages of the river a clear width of waterway of not less than one-hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers;

And, Whereas, To March 15, 1907, is a reasonable time in which to alter the said bridge as described above:

Now, therefore, in obedience to and by virtue of section eighteen of an Act of the Congress of the United States entitled 'An Act making appropriation for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899 (30 Stat. L., 1135), the Secretary of War hereby notifies the said Hannibal Bridge Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15, 1907.

ROBERT SHAW OLIVER,
Assistant Secretary of War."

III.

CRIMINAL INFORMATION FILED IN DISTRICT COURT, UNITED STATES.*

As the defendants failed to comply, within the time prescribed, with the above quoted notice from the "As-

*See Appendix A, p. 86, for copy of Information.

sistant Secretary of War," the District Attorney thereupon filed in the District Court of the United States for the Northern Division of the Eastern Judicial District of Missouri, a criminal information, in two counts, as the same appear in the Record, commencing at page 1 and ending at page 10.

DEFENDANTS FILE DEMURRER.

To the information of the Government the defendants filed demurrer, and for grounds of objection to the information they assigned the following:

"1st. Because it appears on the face of the information that the Secretary of War did not give notice to the defendants, or either of them, to alter the bridge.

2nd. Because failure or refusal to comply with a notice to alter the bridge, given by the Assistant Secretary of War, is the only failure or refusal charged against the defendants, and such failure or refusal does not constitute an offense under the statute.

3rd. Because said information is insufficient and bad for repugnancy in its material allegation in this, to wit: That the allegation that the Secretary of War gave the defendants notice to alter said bridge is repugnant to and inconsistent with the subsequent allegation that the notice given to the defendants was in substance the same as the paper writing set forth in said information signed 'Robert Shaw Oliver, Assistant Secretary of War.'

4th. Because the alleged notice set forth in the information does not specify the changes that are required to be made in the bridge with such particularity as to enable the defendants to comply therewith, in this, to wit: That said alleged notice states that 'new and solid long or protection piers of crib-work shall be built above and below the (proposed) new pivot-piers,' but does not specify or inform the defendants as to the length of the

new and solid long or protection piers they are required to build above or below said new pivot-pier, in order to comply with said pretended notice.

5th. Because said alleged or pretended notice requires that 'proper guard fences be built along the Missouri shore above and below the (proposed) new shore pier', but does not specify or inform the defendants as to the length of the guard fences to be constructed along the Missouri shore by them or the kind of material of which said guard fences are to be constructed.

6th. Because the notice to defendants to alter the bridge, set out in the information, did not specify the changes to be made as required by statute."

THE TRIAL.

The demurrer of the defendants having been overruled, the case came on for hearing at the June Term of said Court for the year 1907, before the Court and a jury. And thereupon the defendants entered pleas of "Not Guilty."

EVIDENCE OF THE GOVERNMENT.

To maintain the issues on its part, the Government offered, and the Court admitted, over the objections of the defendants, the several letters, recommendations, reports, orders and notices referred to and described in our preceding statement, commencing with the letter of John Killeen to the Secretary of War, dated January 2nd, 1905 (page 79 of Record), and ending with the notice signed "Robert Shaw Oliver," Assistant Secretary of War, dated March 10th, 1906 (Record, page 128).

DEFENDANTS MOVE THE COURT TO DIRECT A VERDICT OF "NOT GUILTY."

At the close of the case for the Government, the defendants moved the Court (page 246) to direct the jury to return a verdict of "Not Guilty," for the following, among other, reasons, to-wit:

Because "the evidence does not show, or tend to show, that the Secretary of War granted to the defendants a hearing, or opportunity to be heard, in relation to the complaint against the bridge in controversy, or the proposed changes therein."

Because, "all the notices and other acts with respect to said proceedings, the order and the proposed changes in said bridge were given, performed or caused to be performed by the Assistant Secretary of War, who exercised his own discretion in said matter, contrary to law and the rules and regulations of the Department of War prescribing his duties."

Because, "the evidence conclusively shows that the Assistant Secretary of War, in making such notices of March 10, 1906, mentioned in the information, acted arbitrarily and contrary to law."

MOTION TO DISCHARGE DEFENDANTS OVER- RULED.

The motion to direct the discharge of the defendants was (page 247) by the Court overruled, to which ruling of the Court the defendants at the time excepted.

DEFENDANTS OPEN THEIR CASE.

In opening their case (page 254) counsel for the defendants (Mr. Mahan) stated as follows:

Mr. Mahan (addressing the jury): "I want to call your attention to this fact: That during the interim between 1902, when Secretary Elkins made his finding, to the second charges preferred in 1905, there has not been a sin-

gle accident at that bridge where in there was any injury to a boat or boats of any character or kind, except one accident in 1903, when a boat attempted to pass through the bridge at a period of the highest water ever known in the Mississippi River. And on account solely of insufficient and incapable management of the boat, it struck the piers of the bridge and was sunk.”

The Court (interrupting): “The Court and the jury and counsel might as well understand right here that the question here to be tried is as to whether or not the Secretary of War made the order it is alleged in this information he did make, and whether he made it after evidence had been taken and a hearing had under this section of the statute. And as to whether one or a dozen boats were sunk at that bridge cuts no figure in this case, and will not cut any in the admission of testimony.

I will advise counsel now, it is fair to say, that if the evidence shows that the Secretary of War, acting under this Act of 1899, made an order to make these improvements in that bridge, and they were not made, then the Government is not required to go further in the proof than that particular matter.”

Mr. Mahan (resuming): “Since 1884 this record introduced by the Government will show that boats have passed through this bridge day and night more than three thousand times, without injury. Since 1884 down to 1903 there was this one solitary accident at the Hannibal Bridge.

Now I want to call attention to this specific fact: That this great structure was placed at the spot directed by the Government. It was built under the Act of 1866, with a span of 250 feet long on the Missouri shore, and draw-spans of 160 feet in width in the main and navigable channel, as the law required. Now we are required by the Government under this order to remove the 250-foot span in direct face of the Act which commanded us to put it there. We are commanded by this order of Robert Shaw Oliver, Assistant Secretary

of War, to remove the draw-span from the main and navigable channel of the river, where it was placed by the Act of Congress, over the main and navigable channel, and move it next to the Missouri shore, and close up one-half of the main and navigable channel of the Mississippi River by a permanent span, located so that nobody can pass through it; and put the west span next to the Missouri shore, where there is not now and never was, a navigable channel——”

The Court (interrupting): “You have gone just as far as the Court will permit you after the statement the Court has made in the matter. I have announced my conclusion, and I will not permit counsel to go in the teeth of what the Court says is matter to be properly excluded from this jury.”

Mr. Mahan (resuming): “It is not my purpose at all to violate any rule of the Court, but I had supposed it was entirely proper for me to say to the jury that there was no navigable channel next to the Missouri shore, and that to put a span there would be in direct violation of the authority of the Secretary of War, which solely and alone was to remove obstructions and make navigation free and easy.”

The Court: “I have announced, and I re-announce, that so far as this Act of Congress is concerned, it gives to the Secretary of War the right to make these changes in this bridge; if he sees proper to do so. And if he did make such an order after giving the defendant companies notice of a hearing to be had, and upon the evidence submitted at the hearing he made such an order, the order of the Secretary of War is conclusive upon this Court. This Court is not going to review the question as to whether the Secretary of War made these changes properly or improperly.”

Mr. Mahan (resuming): “May I suggest to your Honor that the Act says ‘lawful order,’ and the Supreme Court has construed that to mean ‘a reasonable order?’ ”

The Court: “I am not going to consider the

question of reasonableness or unreasonableness of the order. * * * Under this Act, according to the construction the Court places upon it, the Secretary of War was authorized to investigate the question as to whether this bridge was an obstruction to navigation. It was within his power to give notice of a hearing, and to get testimony. If upon that testimony he believed that the bridge in the river obstructed the free navigation of the river, he had a right to direct such alterations in the bridge, and to change it, as he saw proper, notwithstanding the Act of 1866."

Mr. Moffatt (Counsel for Hannibal Bridge Company): "But, if we can offer any proof tending to show that it was an unlawful order, we are privileged to do so in defense of our right as citizens brought before the bar of Justice in a criminal case. And the offer we are going to make in our evidence, in an effort to show the unreasonableness of that order, will be two-fold:

In the first place, that the Assistant Secretary of War gave the notice——"

The Court (interrupting): "We have been over that point and do not intend to go over it again."

Mr. Moffatt: " * * * What we intend to show in our defense is that the order which the Assistant Secretary of War made is such as not only to close half the channel, but to compel us to excavate a new channel, and there is no authority in the Secretary of War to compel us to do that."

The Court: "I do not propose to go into that question."

Mr. Moffatt: "You do not propose to let us go into it?"

The Court: "No; go on with your statement. I do not propose to let you go into all these things."

You understand my position in this case, and if I am wrong it may be corrected. I shall hold that the order of the Secretary of War made in this particular case should have been obeyed. If it could not be obeyed, I am not going to sit here and hear whether it could or could not."

Rules of War Department Admitted.

Mr. Moffatt (page 257): "I offer in evidence certified copy of the rules of the War Department (which was offered out of order and marked for identification during the Government case as Defendant's Exhibit 1), and in conjunction with that I offer a certified copy of the order of Mr. Secretary Elkins, under date of January 17th, 1893, and the report of General Mackenzie, upon which it was based. The purpose in offering the second paper referred to is to show there was a precedent in the War Department which precluded the Assistant Secretary of War from acting on this matter."

The Court: "The first paper you offer may be read. The second is refused. I do not propose to go into the question of whether Secretary of War Elkins was right or wrong. I propose to confine it to what the present Secretary of War has done."

To which action of the Court, in excluding the former report of the Secretary of War and the report of Major Mackenzie, the defendants at the time excepted.

The material portion of the rules of the War Department defining the duties of the Assistant Secretary of War (in so far as this case is concerned) are as follows (Record, page 258):

"WAR DEPARTMENT. Washington, December 30, 1903. ORDERS.

The following instructions relating to the methods of business to be employed under the operation of the General Staff System, and to the distribution of official business of the War Department, and action thereon, are hereby published for the information and guidance of all concerned: * * *

The Secretary of War reserves for his final action all cases involving questions of policy, the establishment or **reversal of precedents**, or matters of special or extraordinary importance arising

under the division of jurisdiction hereinafter set forth, and the following classes of business:

1. * * * *
2. * * * *
3. * * * *
4. * * * *
5. * * * *
6. * * * *
7. * * * *
8. * * * *
9. * * * *

Subject to the foregoing conditions and reservation, the jurisdiction of the Assistant Secretary of War will extend to the following military and civil matters: * * * *

EVIDENCE EXCLUDED.

The finding of the Secretary of War in 1893, that the bridge "was constructed in the manner required by the Act of Congress authorizing the same" is (page 267) in words and figures as follows:

"WAR DEPARTMENT.

Office of the Secretary.

Washington, January 17, 1893.

It appearing from the within papers that the Hannibal Bridge was constructed in the manner required by the Act of Congress authorizing the same; that there have been no serious accidents to boats at this bridge during the past ten or twelve years; that there has been no general demand by the river interests for any change in the bridge, but that there is a difference of opinion among those largely interested in the navigation of the river as to the necessity or utility of the proposed changes; that complaints made of the bridge have been based upon *ex parte* statements, and that the proposed reconstruction of the bridge would involve a great expense to those owning or operating the same, without positive assurance of permanent advantage to river interests; no order will be made requiring the reconstruction or improvement

of such bridge, the same not being an 'unreasonable obstruction to the free navigation' of the river."

S. B. Elkins,
Secretary of War."

REPORT OF MAJOR MACKENZIE EXCLUDED.

The material portions of the report of Major Mackenzie to the Chief of Engineers, dated May 5th, 1892, which was excluded by the Court, were (in so far as the present inquiry is concerned) as follows (page 264):

"While it is a simple matter to present the facts relating to the difficulties experienced by the interests of navigation in passing through the Hannibal Bridge, and to suggest the only plan which appears to be a practical one for overcoming these difficulties, it is more difficult to make recommendation as to how such changes of plan can be properly secured.

The Wabash Railroad Company do not own the Hannibal Bridge, but lease and operate it under conditions which would bring upon them the burden of any changes, which, under the law, devolves upon bridge companies. The Wabash Railroad Company make the claim that the Hannibal Bridge was built in exact accordance with the Act of Congress approved July 25, 1866. That such law compelled the Bridge Company to place the draw-openings out in the stream and construct a raft-span between such draw-openings and the Missouri shore; and that the difficulties which now exist, as result of the location of such draw, are the fault of the law and not of the Bridge Company. That the concentration of the river and excessive current at high stages result from the construction of the Sny Carte Levee, for which they are in no way responsible. That the Act authorizing the construction of the Hannibal Bridge expressly reserved to Congress the right to require alterations or changes; and that, even conceding

the present structure to be an unnecessary obstruction, it is nevertheless, as it stands, a legal structure, but that if changed, even for the betterment of navigation, without the action of Congress, the bridge would be an illegal structure. That the law of September 19th, 1890, authorizing the Secretary of War to order alterations in bridges, did not contemplate such a radical alteration as a change of location of draw.

The claims that the bridge was built in accordance with the law of July 25, 1866, that the present difficulties are, partially at least, due to the requirements of the law and that the construction of the Sny Carte Levee is responsible for much of the trouble, are undoubtedly correct."

GENERAL WARREN'S REPORT ON BRIDGE EXCLUDED.

The defendants then offered in evidence (page 268) a certified copy of a report made in 1876 by General W. K. Warren, in pursuance of an Act of Congress.

To the introduction of the report in evidence the District Attorney objected, and his objections were by the Court sustained, to which ruling of the Court the defendants at the time excepted.

That part of the report of General Warren descriptive of the bridge is (page 269) as follows:

"Description of the Bridge.

(See Diagram 27.)

"On the Missouri side the bridge is approached through a short tunnel on a $91\frac{1}{2}$ degree curve, to which the bridge axis is tangent. The line of the bridge is at right angles with the general course of the river. The spans of the bridge commencing at the Missouri side are, first, one 250 feet from center of piers; then a draw-span 300 feet over all, giving two clear openings of 160 feet; then one span 250 feet and four of 180 feet each, making the total length of the bridge 1,580 feet."

THE COURT'S CHARGE TO THE JURY.

The defendants having no further testimony to offer, the Court thereupon proceeded to charge the jury.

After reading Section 18 of the Act of March 3rd, 1899, and the order signed Robert Shaw Oliver, Assistant Secretary of War, as set out in the information, the Court said (Record, p. 290):

“Now it is charged that after an information was lodged with the Secretary of War he directed a hearing to be had, and the parties interested were notified to appear; and evidence has been introduced in this case showing that the defendants, the Hannibal Bridge Company, the Wabash Railroad Company and the Missouri Pacific Railway Company, were notified to appear before an Engineer of the Army and their testimony and evidence was taken; that a hearing was had, and report of the officer made, and thereafter the Secretary of War directed that these changes be made in this bridge.

Congress had the right to confer upon the Secretary of War this power; and the Secretary of War had the right after notice given to the parties for the hearing, to make the order requiring these changes to be made in the bridge. And it is not for me, nor for you gentlemen of the jury, to discuss or try to determine the question of whether the changes directed to be made in the bridge were improper or not. The Secretary of War is, by this Act of Congress, clothed with the authority to say whether this is an impediment to the navigation of the river or not.

If you find from the evidence he has said so, by an order he has issued in this matter, and that was served upon these defendants, and they have not complied with it and that they were in the management and control of that bridge, and failed to comply with the order made by the Secretary of War within the time that he limited them to be made, then these defendants who had charge and

control of that bridge were guilty of a violation of this statute.”

• • • • •

The Court: “I may state, so we may have this question preserved, if we can, that the notice signed by the Assistant Secretary of War, read in evidence here, is a sufficient notice under the statute to which I have referred, and that the changes required to be made were and are sufficiently definite to require compliance with the order.”

JURY RETURNS VERDICT OF “GUILTY.”

The jury, under the instructions of the Court, returned a verdict of “Guilty” on both counts in the information, against both the Hannibal Bridge Company and the Wabash Railroad Company.

FINES IMPOSED.

The Court thereupon assessed a fine of \$2,500.00, against each of said defendants on each of the two counts in the information.

MOTION FOR NEW TRIAL FILED AND OVERRULED.

The defendants thereupon, in apt time, filed their motion for a new trial upon the grounds that are fully stated in the Record at pages 293 and 294.

The motion for new trial being by the Court overruled, the defendants excepted.

MOTION IN ARREST OF JUDGMENT FILED AND OVERRULED.

The defendants thereupon filed their motion in arrest of judgment, for the reasons fully stated in the Record at pages 294 and 295.

The Court having overruled the motion in arrest of judgment, the defendants thereupon again excepted, and the case is brought to this Court on writ of error.

ERRORS ASSIGNED.

The errors assigned in the Record (pages 297-308) are numerous and somewhat voluminous, but those here especially asserted, and now relied upon in this brief of counsel, are as follows:

I.

The Court erred in holding that the information stated facts sufficient to constitute a cause of action against the defendants, or either of them, because the information states that the bridge was erected under the Special Act of July 25th, 1866, which Special Act reserves to Congress the sole right to require alterations in the bridge, and said Special Act of July 25th, 1866, was not repealed or in any way changed or amended by the General Law of March 3rd, 1899, under which the notice set out in the information was given to the defendants.

II.

The Court erred in refusing to direct the jury to return a verdict of "Not Guilty" at the close of the testimony offered by the United States, because the General Act of March 3rd, 1899, under which the information was drawn, does not apply to bridges erected under the Special Act of July 25th, 1866.

III.

The Court erred in charging the jury that under the General Act of March 3rd, 1899, the Secretary of War was authorized to require alterations in the Hannibal Bridge, because the Act of March 3rd, 1899, does not apply to any bridge constructed under the Special Act of July 25th, 1866

IV.

The Court erred in overruling defendant's demurrer to the information, which stated, among other grounds of demurrer, (page 16):

"That the notice set forth in the information did not specify the changes that were required to be made in the bridge with such particularity as to enable the defendants to comply therewith, in this, to wit: That said alleged notice states that 'new and solid long or protection piers of crib-work shall be built above and below the proposed new pivot-pier,' but did not specify or inform the defendants as to the length of the new and solid long or protection piers they were required to build above and below the said new pivot-pier, in order to comply with said notice."

And which demurrer stated as a further ground of objection to the information that the notice therein set out was insufficient in this: That it required 'proper guard fences to be built along the Missouri shore, above and below the new shore pier,' but did not specify or inform the defendants as to the length of the guard fences to be constructed along the Missouri shore, or the kind of material of which said guard fences were to be constructed."

V.

The Court erred in instructing the jury "that the changes required to be made in the bridge were sufficiently definite to require compliance with the order."

VI.

The Court erred in overruling the defendants' demurrer to the information, which demurrer stated, as one of the grounds of objection to said information, that it appeared on the face thereof that the notice to

alter the bridge was given by the Assistant Secretary of War, whereas a failure of the defendants to obey a notice given by the Assistant Secretary of War constituted no offense under the statute.

VII.

The Court erred in charging the jury "that the notice signed by the Assistant Secretary of War was sufficient under the statute" to authorize a verdict of "Guilty."

VIII.

The Court erred in charging the jury that there was evidence offered at the trial "showing that the defendants, the Hannibal Bridge Company and the Wabash Railroad Company, were notified to appear before an Engineer of the Army and their testimony and evidence taken, and that a hearing was had and report of the officer made," because the Record does not show that any witness present was sworn, or that any of the persons whose affidavits were read were present before said officer for cross-examination by the defendants.

IX.

The Court erred in refusing to sustain the demurrer to the information, for the reason "that the same was insufficient and bad for repugnancy in its material allegations, in this, to wit: That the allegation that the Secretary of War gave the defendants notice to alter said bridge was repugnant to and inconsistent with the subsequent allegation therein that the notice given to the defendants was the same as the paper writing set forth in said information signed 'Robert Shaw Oliver, Assistant Secretary of War.' "

X.

The Court erred in excluding as evidence the report of Major Mackenzie, of the Corps of Engineers, dated May 5th, 1892, in which it was found that the bridge was constructed as required by said Special Act; and also in excluding as evidence the report of General Warren, in which it was stated that said bridge was erected as required by said Special Act, all of which reports were offered in evidence by the defendants.

XI.

The Court erred in holding that, under Section 18 of the Act of March 3rd, 1899, the defendants were guilty of an offense in failing to comply with the order of the Assistant Secretary of War, set out in the information.

XII.

The Court erred in holding that under the Act of March 3rd, 1899, the Secretary of War was authorized to require changes in bridges erected in accordance with the Act of July 25th, 1866.

BRIEF.

POINTS AND AUTHORITIES RELIED UPON BY PLAINTIFFS IN ERROR.

I.

The Special Act of Congress, approved July 25th, 1866, under which the bridge was erected, and which reserved to Congress the power to require changes in the structure, was not repealed, or in any wise affected by the subsequent General Law of March 3rd, 1899, under which this proceeding was instituted.

State v. Stoll, 83 U. S. 436;

Rogers v. U. S., 185 U. S. 87;

Sedgewick on Statutory & Constitutional Law, 123;

Bishop on the Written Law, Sec. 112-B, and cases cited;

Commissioners v. Board of Public Works, 39 Ohio St. 628;

Fosdic v. Village of Perrysburg, 14 Ohio St. 472.

II.

The bridge having been erected in accordance with the Act of July 26th, 1866, it thereupon became a lawful structure, and must necessarily continue so until that Act shall be amended. What Congress has made lawful, only Congress can make unlawful.

U. S. v. Keokuk Bridge Co., 45 Fed. Rep. 178, and cases cited.

III.

The alterations to be made in the bridge were not described, in the notice, with such certainty as to enable the defendants to know when they had complied therewith.

The notice required defendants to construct "new and solid long or protection piers of crib work above and below the new pivot pier", but did not inform the defendants respecting the length or width of the "new and solid long or protection piers" they were required to build, either above or below the new pivot pier.

The notice also required "proper guard fences to be built along the Missouri shore above and below the new shore pier", but did not inform the defendants as to the length of the guard fences to be constructed, how far from the shore they were to be placed, or the kind of material out of which such guard fences were to be made.

As the only offense charged in the information consisted of a failure, on the part of the defendants, to do the things required to be done by the notice, it follows that the things required to be done should have been described in the notice with the same degree of certainty that is required in describing the things that may be done, or may not be done, in a penal statute. In other words, "the mandate should have been so clearly expressed that any ordinary person could determine in advance, what he might, and what he might not do, under it."

U. S. v. Keokuk Bridge Co., 45 Fed. Rep. 178;
Chicago & N. W. Ry. Co. v. Dey, 35 Fed. Rep.
876;

U. S. v. Cruikshank *et al.*, 92 U. S. 557;
McConville v. Myer, 39 New Jersey Law 38;
Louisville & Nashville Ry. Co. v. Commissioners,
19 Fed. Rep. 679.

A CONTRACT FOR WORK, OF SUCH VAGUE DESCRIPTION, COULD NOT BE SPECIFICALLY ENFORCED.

If this were a suit on a contract to build a "long pier", a "proper guard fence", or a "good house", there could be no decree for specific performance, because of insufficient description of the work to be performed.

Bishop on Contracts, Sec. 316;

Beach on Contracts, Sec. 76, and cases cited.

IV.

The defendants should have been discharged, because it was no offense under Section 18 of the Act of March 3rd, 1899, under which this case is prosecuted, for them to refuse to comply with the notice signed by the Assistant Secretary of War.

The office of "Assistant Secretary of War" is not mentioned in said Section 18, and Criminal Statutes cannot be enlarged by construction, nor can new, or additional words, be read into them.

U. S. v. Wiltberger, 5 Wheat 76;

U. S. v. Harris, 177 U. S. 305;

In re Enterprise, First Payne, 32.

V.

The parties owning and operating the bridge were not given "a reasonable opportunity to be heard", in the sense in which those words are employed in the Act of March 3rd, 1899.

The word "hearing", and the words "reasonable opportunity to be heard", are not new in legislative enactments.

These terms signify that the party, who is by the statute, accorded a "reasonable opportunity to be

heard", and whose personal or property rights may be affected, has three recognized rights: **First**, the right to be present, and to be represented by counsel. **Second**, the right to have the witnesses testify under the sanction of an oath, and **third**, the right to cross-examine the witnesses who may appear against him.

In this case the proceedings at the so-called "hearing" consisted of the reading of the unverified replies of the parties to whom Major Lusk had addressed letters (as shown, ante pp. 12 to 14, inclusive).

There were also read the *ex parte* affidavits of a number of persons, none of whom were present. But at no time during the proceedings were the defendants afforded an opportunity to cross-examine any of the persons interrogated by Major Lusk, or any of the persons whose *ex parte* affidavits were read as a part of the proceedings.

People *ex rel.* Keach v. Thompson, 94 N. Y. 451;
Mayor v. Nichols, 79 N. Y. 582, and cases cited.

VI.

There was a fatal variance between material allegations of the information, and the proof; the allegation being that the **Secretary of War** gave the notice, and the proof being that the "**Assistant Secretary of War**" gave the notice.

United States v. Cantril, 4th Cranch. 167;
U. S. v. Hardyman, 37 U. S. 176.

VII.

There is nothing in the Act creating the office of "**Assistant Secretary of War**" (or in the Act of March 3rd, 1899) that advised the defendants that they were required to obey a notice signed by that officer. The Act creating that office is as follows:

“BE IT ENACTED, That there shall be in the Department of War an Assistant Secretary who shall be appointed by the President, by and with the advice of the Senate, who shall be entitled to a salary of \$4,500.00 a year, payable monthly, and who shall perform such duties in the Department as shall be prescribed by the Secretary or which may be required by law” (26 U. S. Stat. at Large, 17).

VIII.

There was absolutely no proof offered either at the so-called “hearing” before the Secretary, or at the trial of the defendants in the District Court, to support the charge in the information to the effect that the bridge was not erected in accordance with the Act of July 25th, 1866

ARGUMENT.

I.

The **Special Act of Congress**, approved July 25th, 1866, under which the bridge was erected and which reserved to Congress the power to require changes in the structure, was not repealed or in any wise affected by the subsequent **General Law of Congress** that conferred on the **Secretary of War** a general power to require changes in bridges over the navigable waters of the **United States**.

(a) Bishop defines private or special laws, as distinguished from general laws, as follows:

“**A private or special statute** is one which affects only particular persons or things.” (Bishop on the Written Law, Sec. 42-c, and cases cited.)

“And a **public or general statute** (he says) is one which affects either all the people of the State or all of a particular condition, class or locality therein, in distinction from individuals designated by name or description.” (Same author, Sec. 42-a.)

In this case Congress by the **Special Act** of July 25th, 1866, authorized certain designated parties to construct bridges at designated places in a designated manner, over the navigable waters of a designated river, and in this **Special Act Congress** reserved to itself the right to alter or amend the Act as “to prevent or remove all material obstructions to the navigation of said river.”

That enactment, we think, falls clearly within the definition of a “**Special Law**.”

Afterwards Congress passed a **general law** that conferred on the **Secretary of War** authority to require changes in bridges over the navigable waters of the

United States, whenever he believed them to be unreasonable obstructions to the free navigation of such waters.

That Act, no doubt, falls clearly within the definition of a "General Law."

Now, if it be first agreed that in the Special Act of July 25th, 1866, Congress reserved to itself the power to require changes in the bridges erected under that Act, then, in order to say that the power that was reserved to Congress in the Special Act is now vested in the Secretary of War, it must be conceded **that the Special Act of 1866 was amended by the General Act of 1899.**

On this point the case presents no issue respecting the **powers of Congress**. The inquiry is not as to what Congress **might have enacted**, but as to how we are to interpret and construe this General Act of March 3rd, 1899. It contains no negative words, or words of repeal, and therefore the Record fairly presents the question of whether it can be said that by the passage of this general law it was the **intention of Congress** to so amend the Special Act as to transfer to and vest in the Secretary of War a power that had been by the Special Act reserved by Congress to itself.

On that question the universal rule, both in this country and in England, seems to be that **special legislative enactments** are not changed, or in any manner affected, by the passage of subsequent general laws.

We find nowhere in the books a clearer statement of the rule for which we contend than is found in the opinion of this Court in the case of **State vs. Stoll** (83 U. S., page 436), where it was said:

"The provisions of a special charter or a special authority derived from the Legislature are not

affected by general legislation on the subject. The two are to be deemed to stand together; one is the general law of the land, the other is the law of the particular case."

Again, in announcing the general rule on this subject, in the case of **Rodgers vs. United States** (185 U. S., commencing at page 87), this Court said:

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. In **ex parte Crow Dog** (109 U. S., 556, 570), this Court said:

"The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is **generalibus specialibus non derogant**. "The general principle to be applied," said Bovill, C. J., in *Thorpe v. Adams* (L. R. 6 C. P., 135), "to the construction of the acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together." "And the reason is," said Wood, V. C., in *Fitzgerald v. Champenys* (30 L. J. M. S. eq. 782; 2 Johns & Hem. 31, 54), "that the Legislature, having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend

by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.” ’

In **Black on Interpretation of Laws**, 116, the proposition is thus stated:

‘As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.’ ”

In **Sedgwick on Statutory and Constitutional Law** (page 123) the general rule is stated as follows:

“In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule, that a general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent; * * * the reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter Act such a construction, in order that its words shall have any meaning at all. So where an Act of Parliament had authorized individuals to inclose and embank portions of the soil under the River Thames and had declared that such land should be free from all taxes and assessments whatsoever.’ The Land Tax Act, subsequently passed, by general words embraced all the land in the kingdom; and the question came before the King’s Bench, whether the land mentioned in the

former Act had been legally taxed; and it was held that the tax was illegal."

In "Bishop on the Written Law" (Sec. 112-b) the same rule is stated as follows:

"Ordinarily, if there are a general statute and one local or special, on the same subject, in conflicting terms, neither abrogates the other, but both stand together; the former furnishing the rule for the particular locality or case, the latter for the unexcepted places and instances. And it is immaterial which is the later in date."

The point for which we here contend is well illustrated in the case of **Commissioners vs. Board of Public Works**, 39 Ohio State, 628.

In that case the General Assembly of Ohio had passed an Act in 1868, authorizing the **Commissioners of Muskingum County** to build a bridge across the Muskingum River at such point, within designated limits, as said **Commissioners** might determine.

The second section of the Act of 1868 provided that before the construction of said bridge should be commenced "the said **Commissioners** should **submit the plan** of the same (but not the location) to the Board of Public Works of the State and receive their approval thereof."

Afterwards the Legislature of the State passed a General Law respecting the erection of bridges, which provided "that no bridges should be constructed or erected without first obtaining for the model and **location thereof**, the consent in writing of the State Board of Public Works."

So it appeared that by the **Special Act** the right to determine the **location** of the bridge was vested in the **County Commissioners**, and by the subsequent **General**

Law the right to determine the location was vested in the State Board of Public Works.

The Commissioners of Muskingum County afterwards presented to the "Board of Public Works" the model or plans of the bridge as provided in the Special Act of February, 1868; but the Board of Public Works refused its approval, because they **disapproved of the location** of the bridge. It being contended by the State Board of Public Works that the effect of the subsequent general law **requiring their approval of the location**, as well as of the plan of a bridge, was to repeal so much of the Special Act of 1868 as gave to the County Commissioners of Muskingum County the right **to determine the location of the bridge**.

In deciding the question of whether the power to **determine the location of the bridge** remained in the County Commissioners of Muskingum County, under the Special Law of 1868, or became vested in the State Board of Public Works by force of the subsequent general law, the Court said:

"Repeals by implication are not favored. So, particular and positive provisions of a prior act are not affected by a subsequent statute treating a subject in general terms and not expressly contradicting the provisions of the prior act, unless such intention is clear. **Perrysburg vs. Fosdick** (14 O. S. 472); **Knox Co. vs. McComb** (19 O. S. 320, 346); **Shunk vs. First National Bank** (22 O. S. 508, 515); **Olds vs. Franklin Co.** (20 O. S. 421); **Allen vs. Russell** (39 O. S. 336).

The decided weight of authority supports the proposition that when there is a general act, and also one local and special on the same subject, in conflicting terms, neither necessarily abrogates the other, but both are permitted to stand together and it is immaterial which is of the later date. **Bishop on the Written Laws**, 112 b.; **Crane vs.**

Reeder (22 Mich., 322); **People vs. Quigg** (59 N. Y. 83).

If the legislative intent that the **general law** shall supersede the local and special act is clear, it will, of course, prevail. No such intent being manifest in the present case, we conclude that the provisions of the acts under which the commissioners are proceeding must prevail, and that the location of the bridge was a subject confined exclusively to them."

In Fosdic v. Village of Perrysburg (14 Ohio St., 472), the facts were as follows:

The act "to incorporate the Dayton and Michigan Railroad Company" authorized the corporate authorities of Perrysburg to subscribe to said railroad any sum not exceeding \$50,000.

By the 5th section of the charter the **corporate authorities of Perrysburg** were vested with all the powers and subjected to all the restrictions imposed upon the Commissioners of Clark County under an act approved March 8th, 1850. By the act last mentioned it was made the duty of the Commissioners of Clark County to annually levy a tax sufficient to pay the interest on all subscriptions made by it to railroads.

By the provisions of a **subsequent general law** of the state, the rate of tax that might be legally levied by the corporate authorities of such cities and villages as Perrysburg was so reduced as to make the revenue insufficient to pay interest on the subscription that had been made by the City of Perrysburg to the railroad.

On that state of facts the Village of Perrysburg contended that the **subsequent general law** of the State limiting the rate of tax that might be levied **operated as a repeal** of so much of the **prior special act** as re-

quired the rate of tax to be sufficient to pay interest on the subscription.

After stating the issues in the case the Court (page 485) said:

“The question thus made is not without difficulty, but there is a rule of statutory constriction, well established by authority and reasonable in itself, which, it seems to us, leads to a satisfactory solution. In Sedgwick, on Statutory Laws, 123, it is said: ‘In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule that a **general** statute without negative words will not repeal the **particular** provisions of a former one, unless the two acts are irreconcilably inconsistent. The reason and philosophy of the rule is,’ he continues, ‘that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction in order that its words shall have any meaning at all.’ And the rule is well illustrated by the case of **Williams v. Pritchard**, 4 D. & E. 2, which he cites, that ‘where an act of parliament had authorized individuals to inclose and embank portions of the soil under the river Thames, and had declared that such land should be ‘free from all taxes and assessments, whatsoever,’ the land tax act, subsequently passed, by general words embraced all the land in the kingdom; and the question came up before the king’s bench, whether the land mentioned in the former act had been legally taxed; and it was held that the tax was illegal.’ The rule is also laid down in **Gregory’s case**, 6 Coke’s Rep. 19 b., where, it is said, ‘a later statute in the affirmative shall not take away a former act; and *eo potius* if the

former be particular, and the latter general.' The rule is also recognized in *Dwarris on Statutes*, 658-9; in *Williams v. Williams*, 4 Selden 533; and in *Brown v. County Commissioners*, 21 Penn St. R. 43. This last case presented a question of statutory construction, which is closely analagous to the question here before us. There the legislature of Pennsylvania had, by special act, established a county board, for the County of Philadelphia, consisting of the members for the time being of the Senate and House of Representatives from the city and county, and the act declared that it should not be lawful for the county **commissioners** of that county to levy any tax or borrow any money without the consent of the county board.

By a subsequent general act, 'relating to counties and townships and county and township officers,' it was declared that 'the corporate powers of the several counties and townships **shall be exercised by the commissioners** and supervisors thereof respectively.' It was held by the supreme court of the state, that this provision of the general act did not repeal by implication the provisions of the prior special act above referred to; and Black, C. J., delivering the opinion of the court, says: 'It seems to be well settled that a general statute without negative words cannot repeal a previous statute which is particular, even though the provisions of one be different from the other. Precisely such are the statutes before us. It is against reason to suppose that the legislature, in framing a general system for the state, intended to repeal a special act which the local circumstances of one county had made necessary.' Applying the remark and the rule which it sanctions to the case before us, we say it is against reason to suppose that the legislature, in framing a general system for the organization and ordinary government of municipal corporations, intended to repeal, wholly or in part, pre-existing special acts which had been passed in view of the supposed interests and wants of par-

ticular localities, in respect to a subject matter not connected with their organization or ordinary government.”

(b) It ought not to be presumed that when Congress passed the **General Act of 1899**, it was ignorant of the rule that prior special acts were not affected by subsequent general ones.*

There is a conclusive presumption that Congress knew that all its enactments were to be construed according to certain fixed rules that have been found, from long experience, to be best adapted for ascertaining with accuracy, the legislative intention. Among those rules is the one stated in the cases from which we have already quoted, to the effect that **General Laws** are not to be construed as affecting **prior special ones**, unless it is necessary to give them such a construction in order that they may have some meaning, or unless they contain such negative words, or words of repeal, as make an intention to change the special act absolutely certain.

In this case it is not necessary to say that the Act of March 3rd, 1899, should be so construed as to modify or repeal the Special Act of July 25th, 1866, in order that it may have some meaning, because no one can now deny that under the decisions of this Court, the Secretary of War can, under that act, cause the removal of any one or more of the hundreds of bridges that have been erected in and over the navigable waters of the United States, **without Congressional authority**.

Therefore, as this General Act of March 3rd, 1899, undoubtedly applies to a vast number of bridges like those above mentioned, and inasmuch as it contains no negative words, or words of repeal, **it cannot be pre-**

*See Appendix C, p. 107, for copy of Act of 1899

sumed that it was the intention of Congress to in any way change this Special Act of July 25th, 1866.

In order to affirm in this case, that it was the **intention of Congress** that this General Law should affect the prior special one, we must assume that Congress was wholly ignorant of the long established rule employed in this and other courts, for ascertaining the legislative intention. But if we assume, however, that Congress did know that rule, and that it **did not intend** to have this General Law affect the prior special one, then it seems clear that in such case, it would have adopted the General Law of 1899 in exactly its present form.

II.

The bridge having been erected in accordance with the Act of July 26th, 1866, it is now, under that Act, a lawful structure, and must continue so until that Act shall be amended.

(a) It must be conceded, we think, that the record shows this bridge to have been constructed in accordance with the Special Act authorizing its erection.

On that point we quote from the finding of the Secretary of War, dated January 17th, 1893 (introduced in evidence by the Government), in which he stated (page 84 of record) as follows:

“It appearing from the within papers that the Hannibal Bridge was constructed in the manner required by the Act of Congress authorizing the same; that there have been no serious accidents to boats at this bridge during the past ten or twelve years; that there has been no general demand by the river interests for any change in the bridge, but that there is a difference of opinion among those largely interested in the navigation of the river as to the necessity or utility of the proposed

changes; * * * no order will be made requiring the reconstruction or improvement of such bridge, the same not being an 'unreasonable obstruction to the free navigation' of the river."

Again, on that point, General Mackenzie, of the Corps of Engineers, in his report of May 5th, 1892, certified copy of which was offered in evidence by the defendants and excluded by the Court, stated (page 265 of Record) as follows:

"The claims that the bridge was built in accordance with the law of July 25th, 1866, that the present difficulties are partially at least, due to the requirements of the law, and, that the construction of the Sny Carte Levee is responsible for much of the trouble, **are undoubtedly correct.**"

And again, in the **Report of General Warren**, certified copy of which was offered in evidence by the defendants and excluded by the Court, he describes the bridge (page 269 of Record) as having been erected in exact accordance with the Act of 1866.

On that record, our contention is that this bridge, having been built in accordance with the Act of 1866, is now a lawful structure, and must remain so until Congress amends the Act under which it was erected, and that although future changes **may be required by Congress**, we are, nevertheless, **entitled to the judgment of Congress** respecting the terms on which such changes shall be made.

The case of **United States v. Keokuk Bridge Company** (45 Fed. Rep. 178) arose under an Act of Congress approved August 11th, 1888 (25 St. at Large, p. 424), which was, in so far as the questions now under consideration are concerned, the same as the Act of March 3rd, 1899, under which this case arose, and is now prosecuted.

In that case the Secretary of War had ordered changes to be made in the bridge over the Mississippi River at Keokuk, with which order, the bridge company having failed to comply, the action was, as in this case, brought to recover the penalties imposed by the statute.

That bridge had been erected under and in accordance with the Act of July 25th, 1866 (being the same act which authorized the erection of this bridge at Hannibal), and the question presented was as to whether, under the Act of August 11th, 1888 (being the same as that of March 3rd, 1899), the Secretary of War had authority to require changes in a bridge constructed in accordance with the act of Congress authorizing its erection.

In that case, after stating the facts, the Court (Shiras, J.) said (pp. 180 and 181):

“The argument is that the bridge in question was originally built under the authority conferred by the Act of Congress of July 25th, 1866, and that as built it conformed to the requirements then prescribed by Congress, and was therefore a legal structure; that admitting that for any cause since arising the bridge may now be a greater obstruction to navigation than it formerly was, still it is for Congress to determine whether the obstruction caused by it is sufficiently great as to require a change in the bridge, and if so, to determine the nature and extent of such change.

If it be true that the bridge in question when erected met all the requirements of the act of Congress under the authority of which it was built, so that it was then a legal structure, it is difficult to evade the conclusion that it would require an act of Congress to so change its **status** as to render the bridge company liable to punishment for maintaining it as it was originally constructed * * *

If, therefore, in a given case, Congress author-

izes the construction of a railway bridge across a navigable river, and prescribes the location and mode of its construction, and the bridge is built in conformity therewith, it is certainly then a legal structure, and the obstruction caused by it to the navigation of the river must be deemed to be a burden lawfully imposed upon the free navigation of the river, of which no one can legally complain. If upon the completion of the bridge it becomes apparent that the same, owing to its location or mode of construction, or through some change in the channel of the river, is in reality an unreasonable obstruction to the navigation of the river, Congress can require it to be remodeled, or to be entirely removed, if that be the only remedy. Until Congress, however, requires it to be remodeled or removed, it certainly cannot be claimed that the bridge company is liable in any form of proceeding to be fined or punished for maintaining the bridge, or that the structure can be judicially declared a nuisance, and abatable as such. The ruling of the Supreme Court in the **Wheeling, Etc., Bridge case**, 18 How. 421, is conclusive upon this proposition.

It follows, therefore, that if a bridge is constructed in accordance with the provisions of an act of Congress authorizing the erection, it is, when thus constructed, a legal structure, and its **status** in this particular cannot be changed by judicial action, or by any power short of that which legalized it in the beginning.

It is certainly a defense to an action brought under Section 10 of the Act of August 11th, 1888, to recover a fine for maintaining a bridge across a navigable river which is claimed to be in fact an obstruction to navigation, if it be shown that the bridge as constructed has been declared a legal structure by the Congress of the United States, which may be done by showing, as in the **case of the Wheeling, Etc., Bridge**, that after its erection Congress legalized it, or by showing that Congress authorized its erection, and prescribed the

location and form of the structure, and that it was built in accordance therewith.

The bridge-owner cannot be made liable to a fine or for damages simply because the bridge may be in fact an obstruction to the navigation of the river, but only in case the obstruction is illegal; and that cannot be predicated of a bridge built under the authority of, and in accordance with the requirements of, an act of Congress. Therefore, in the present case, if it be true that the bridge owned by the defendant company was built under the provisions of the act of Congress of July 25th, 1866, and when completed met the requirements of that act, so that it was then a legal structure, and it has not since been changed or become out of repair, but still continues to fulfill the requirements of the act under which it was constructed, then it must be shown, in order to subject the defendant company to liability for the maintenance of the bridge, that Congress has in some proper mode required a change or alteration to be made therein, and that the company has failed or refused to comply with such requirement, and has thus rendered itself liable for the maintenance of what Congress has thus declared would become an illegal structure, unless changed or remodeled in accordance with the requirements prescribed by Congress."

We can add nothing to the clearness or force of the statement of Judge Shiras in the foregoing paragraph of his opinion.

(b) It should not be presumed that Congress intended to commit a wrong by making the bridge company responsible for dangerous currents in the river, caused by the action of Congress itself.

This record clearly shows, we think, that the conditions at the bridge have been so changed by the authority of Congress, as to greatly increase, if not to produce, all the dangers now complained of. In support

of that proposition we have just quoted from the report of **General Mackenzie** his statement "that the construction of the Sny Carte Levee is responsible for much of the trouble".

Again, in his same report (page 265 of Record) he states:

"If it should be deemed proper to present this matter to Congress for its consideration, a question would arise as to whether such work should be required at the sole expense—(probably not less than \$150,000.00)—of the Wabash Railroad Company, or, in consideration of the fact that the present trouble is, partially at least, due to the original law, and **construction of the Sny Carte Levee** the United States should in consideration of the Wabash Company carrying out the desired work, refund to them such a proportion of the expense as might, by a proper tribunal, be deemed equitable and just."

And again, **General Davis**, in his report (offered in evidence by the Government) states (page 144 of Record) as follows:

"It is proper to observe also, that the difficulty of passing the bridge, at high stages of the water, has been added to by **Congress in authorizing the construction of the Sny Levee** on the left bank of the river, a short distance above the bridge; the operation of the levee being to reduce the width of the river at high water, and cause a considerable volume of water to pass under the bridge, which formerly overflowed on the Illinois side.

This consideration, whatever force may be assigned to it in the determination of the questions involved, makes in favor of, or operates to diminish the liability of the Bridge Company."

Now, if it be true, that the conditions complained of at this bridge were caused either wholly or in part by subsequent Congressional action, it would

be one thing to have the terms on which alterations in the structure shall be made, considered and determined **by Congress**, and quite another thing for the owners of the bridge to be committed into the hands of an executive officer, like the Secretary of War, who, whatever his inclinations and ideas of justice may be, can only order the changes to be made, without possessing any power whatever to adjust the equities, of the respective parties, that have arisen out of their conduct towards each other in this transaction.

It would not be true, therefore, for anyone to assert, in a case like this, that **it makes no difference** to the owners of the bridge whether the alterations are ordered by Congress under its reserved power, or by the Secretary of War under an arbitrary power vested in him.

If this were a case in which "A", as a private owner, had granted to "B" a right that could, by the expenditure of large sums of money by "B", be made of great value to him, so long as the currents of a river were permitted to flow in their natural channel, and if after "B" had expended his money, "A" should then proceed to erect, or permit to be erected, such structures as would change the channel, and thereby greatly injure or destroy the value of the grant to "B", would we not, in such a case, say that in equity and fairness, "B" should have some compensation for his loss? And may we not, as citizens, presume that a Government established and maintained for our protection, will act in the same spirit of justice that we all expect one good citizen to exercise towards another?

We do not say that Congress, in the exercise of its sovereign power, cannot in any case, wrong a citizen.

We only say that when Congress has made a grant to a citizen, and in doing so has reserved to itself the power to modify the grant, it ought not to be presumed that in the exercise of its reserved power, Congress will deal unfairly, or knowingly inflict an injury.

In this case the citizens who erected, and now own, the Hannibal bridge are not wrongdoers; in building the bridge, they acted on their faith in that Department of the Government that is by the Federal Constitution, vested with control over the navigable waters of the country; having performed their part, and expended their money on that faith, they should not now be treated as outlaws, and their bridge should not be torn down and destroyed, on the order of an executive officer, who has no power to award them compensation, when by the Act under which they made their investment, they were promised that the **judgment of Congress** should determine the conditions on which changes in the structure should be required.

Our contention is, that these defendants are not in the attitude of those who have obstructed the navigable waters of the country in the erection of bridges without Congressional authority, and that they should not be dealt with under the rules applied, by this Court, in cases of that sort.

This is a case in which we believe we may be permitted to invoke, for the protection of these defendants, the recent utterances of this Court in the case of **The President, etc., of the Monongahela Bridge Company v. the United States**, (216 U. S. 177).

That was a case in which a bridge had been erected over the Monongahela River (without Congressional authority) in such manner as to constitute an obstruction to the free navigation of that river. Complaints

having been made respecting the bridge to the Secretary of War, he proceeded under Section 18 of the Act of March 3rd, 1899, to order certain changes to be made.

In that case counsel for the Bridge Company urged in this court, with great force, the dangers to property interests that might be expected to flow from the exercise, by the Secretary of War, of the arbitrary powers vested in him by the act above mentioned.

In reply to those suggestions of counsel, Mr. Justice Harlan, speaking for this court, said:

“Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under an Act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with law, for acts, whether done by Government or by individual persons, that violate natural justice, or were hostile to the fundamental principles devised for the protection of the essential rights of property.”

That language was, as already stated, used in a case wherein a bridge had been erected in and over the navigable waters of the United States, **without Congressional authority**, and such bridge was therefore, in the eyes of the law, an unlawful structure and constituted a nuisance in a public highway.

That, however, is not this case. This is a case in which a bridge has been erected in and over the navigable waters of the United States **with Congressional authority**, and in accordance with the Act authorizing

its erection, and which bridge is in and by that Act declared to be a lawful structure, and a post road of the United States.

It is for those reasons that we now ask this Court to find some remedy, consistent with law, whereby the destruction of this bridge, which on this record would be an act violative of every principle of natural justice towards these defendants, may be averted.

III.

The Alterations to Be Made in the Bridge Were Not Described in the Notice With Such Certainty as to Enable the Defendants to Know When They Had Complied With It.

Before entering their plea of not guilty in the District Court the defendants, in apt time, filed (page 17 of Record) demurrer to the information, and stated among other grounds of objection, the following:

“1. That the alleged notice states that ‘new and solid long or protection piers of crib work shall be built above and below the new pivot pier’, but does not inform the defendants as to the length of the ‘new and solid long or protection piers’ to be built either above or below said new pivot pier.

“2. That the alleged notice requires that ‘proper guard fences to be built along the Missouri shore, above and below the proposed new short pier’, but does not inform the defendants as to the length of the ‘guard fences’ to be constructed along the Missouri shore; the manner of their construction, or the material of which they are to be constructed.”

The demurrer was overruled by the Court. The defendants excepted, and that ruling is (among others) assigned as error.

The Act of Congress under which the defendants are prosecuted (Section 18 of the act of March 3rd, 1899) requires that the Secretary of War shall in his notice **specify the changes that are to be made in the bridge.**

Therefore the question now presented is, as to whether, in this case, it was a sufficient specification of the changes required to be made, for the Secretary of War to say to the defendants, "that new and solid long or protection piers of crib work should be built above and below the new pivot pier," without indicating in any way the length of the protection piers that would be regarded as a compliance with the notice?

Or whether it was sufficient to state that "proper guard fences should be built along the Missouri shore above and below the new shore pier", without indicating in any way the length of the guard fences, the manner of their construction, or the material out of which such guard fences should be made.

This identical question was considered in **United States v. Keokuk Bridge Company** (45 Fed. Reporter 178), from which we have already quoted.

In that case the notice of the Secretary of War required such changes to be made in the bridge as would "render navigation through or under it free, easy and unobstructed". That notice was held void for uncertainty, and in passing on the point, the Court said (page 184):

"It would seem that in some fair way the bridge company should be notified of what was required of it before it could be adjudged to be in default, and be subjected to a fine; or, in other words, the Secretary should declare in what particular the bridge should be rebuilt, remodeled or changed, so that the owner thereof could reasonably know what was expected of him. It certainly could not be per-

mitted to the Secretary, without any hearing afforded to the company, to declare that the bridge was an obstruction, and then to notify the company that the bridge must be altered or remodeled, without pointing out either the character of the obstruction or the changes deemed necessary to be made in order to meet the views of the Secretary.

Unless properly notified of what was expected of the company, the latter might make many and costly changes in the bridge, and still be liable to punishment because it had failed to make the changes which the Secretary had in mind, but had failed to declare or make known to the company. Thus the company, under a general notice to alter its bridge, might at great expense increase the height thereof, and then be fined for not widening the span between the piers, or *vice versa*. If the action taken by the Secretary simply amounts to saying: 'This bridge is an obstruction to navigation; alter it'—it would seem clear that the bridge-owner cannot be charged with the duty of guessing at what is required, and be subjected to a fine by way of punishment because it failed to properly solve the riddle. The notice given to the defendant company in this instance, after the recitals therein, reads as follows:

'I, Wm. C. Endicott, Secretary of War, do hereby notify the said Keokuk & Hamilton Bridge Company to so alter the said bridge as to render navigation through or under it free, easy and unobstructed, and prescribe that said alteration shall be made and completed on or before the 31st day of March, 1889.'

This notice requires the Bridge Company to so alter the bridge as to render navigation under it free, easy and unobstructed. Literally construed, this would practically require the bridge to be wholly removed, for no bridge having a draw to be passed can exist without placing some obstruction in the way of free navigation of the stream over which it rests.

From such a notice, how is it possible for the

bridge company to ascertain what is required of it, except that it must leave the navigation of the river 'free, easy and unobstructed', which is impossible, so long as the structure remains resting on piers built in the river, with a draw for the passage of steamboats and other like craft through it. If it is said that such a notice must be construed to mean that the obstruction caused by the bridge must be reasonable, and that it must be altered so as to be only a reasonable obstruction, the difficulty still remains that no guide or direction is given to the company for determining how much of an obstruction would be deemed reasonable.

The notice does not require that the bridge shall be such a height, or of a given span between the piers, or that the draw shall be placed at a given point, or at a given angle to the current, nor is it declared that the bridge is an obstruction because of insufficient height, width of span, or otherwise, and hence the company is left wholly in the dark as to what is really required of it.

Whose judgment is to determine whether the bridge is in fact an unreasonable abstraction? If, under this notice, the company had expended thousands of dollars in remodeling the bridge, and it had then been sued because the navigation of the river was not free, easy and unobstructed on account of the bridge, what criterion could be appealed to for determining whether the company had met or failed to meet the requirements of the notice served upon it? If the notice itself had pointed out specifically what was required of the company, then it might be shown that these requirements had or had not been complied with; but the notice, as served, gives no criterion for determining what was expected of the company, except that the navigation of the river must be left free, easy and unobstructed; which requirement cannot be met except by wholly removing the bridge."

We suggest that even in a civil suit, a contract to build "a long pier", "a proper guard fence" or "a

good house", would be held void for uncertainty and incapable of enforcement.

Bishop on Contracts, Sec. 316, and cases cited;
Beach on Contracts, Sec. 76, and cases cited.

But this, it must be considered, is a **criminal proceeding**. It is one in which **the offense itself** consists of a failure on the part of the defendants **to comply with the notice**, and it follows, therefore, that the changes to be made in the bridge by the defendants should have been described **in the notice** with the same particularity as would be required in describing, in a criminal statute, the acts prohibited or the acts to be performed.

On this point we know of no clearer statement of the rule requiring **certainty**, in the terms of criminal statutes, than was made by Judge Brewer in the case of *C. & N. W. Ry. Co. v. Dey* (35 Fed. Rep. on page 876).

In that case it was contended by counsel that the statute under consideration was in its terms too vague to admit of its enforcement. In disposing of that contention Judge Brewer said:

"If this were the construction to be placed upon this act as a whole it would certainly be obnoxious to complainants' criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

In *United States v. Cruikshank et al.* (92 U. S. at page 557), this Court, in stating the general rule on this subject, said:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitu-

tional right 'to be informed of the nature and cause of the accusation.' (Amend. VI.) In **United States v. Mills**, 7 Pet. 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged'; and in **United States v. Cook**, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged'."

In **McConville v. Mayor** (39 New Jersey Law, 38) the prosecution was under an ordinance providing that "no person shall drive or cause to be driven, any drove or droves of horned cattle (except milch cows) through any of the streets or avenues of Jersey City".

In that case the Court refused to submit to the caprice of a jury the question as to what would be considered "a drove or droves of horned cattle".

In **Louisville & Nashville Ry. Co. v. Commissioners** (19 Federal 679), the prosecution was under an act that prohibited carriers from charging "unjust and unreasonable compensation", and from making "unjust and unreasonable discriminations".

In that case the statute was held void for uncertainty, because the terms "unjust and unreasonable compensation", and "unjust and unreasonable discriminations" were too indefinite to sustain an action *quasi criminal* in its nature.

IV.

The Defendants Should Have Been Discharged, Because It Was No Offense, Under the Statute, for Them to Refuse to Act, on a Notice Signed by the "Assistant Secretary of War".

Before entering upon the trial, the defendants demurred to the information, and, among other grounds

of objection, they stated "that a failure on their part to obey an order signed by the **Assistant Secretary of War**, did not constitute an offense under the statute".

The demurrer was overruled, and at the close of the evidence the Court (page 291) instructed the jury, among other things, "that the notice signed by the Assistant Secretary of War was sufficient under the statute."

Therefore, the question is here fairly presented as to whether the scope of this **penal statute** should be so expanded by construction as to make it an offense for the defendants to disregard a notice given by the "Assistant Secretary of War", when that officer is not even mentioned in the act under which the defendants are prosecuted.

And now, considering the fact that this criminal information is based solely on Section 18 of the Act of March 3rd, 1899; that said section only makes it an offense to disregard a notice **signed by the Secretary of War**, and that the office of "Assistant Secretary of War" is not even mentioned in said section, we ask the Court to apply in this case, the general rule respecting the construction of penal statutes, as the same is stated by **Chief Justice Marshall** in **U. S. v. Wiltberger** (5 Wheaton 76), where (commencing on page 95) he said:

"The intention of the Legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be

dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.”

In **U. S. v. Harris** (177 U. S. 305) the action was brought against the defendant as Receiver of the Philadelphia & Reading Railroad, to recover a penalty of \$500.00, for violating the Act of March 3rd, 1873, entitled “An Act to prevent cruelty to animals while in transit by railroad or other means of transportation, within the United States”.

The act appears in U. S. Rev. Stat. as Sections 4386-4387-4388-4389.

Section 4386 provided that: “No railroad company within the United States, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another
• • • shall confine the same in cars for a longer period than 28 consecutive hours, without unloading the same for rest, water and feeding”, etc.

Section 4387 provided that: “Animals so unloaded should be properly fed”, etc., and Section 4388 provided: “That every company, owner or custodian of such animals, who should knowingly and wilfully fail to comply with the provisions of the two preceding sections, should for every such failure be liable for and forfeit and pay a penalty of not less than \$100.00, nor more than \$500.00.”

In that case the Government contended that a “Receiver” when operating a railroad came “within the purpose and spirit” of the act, but this Court refused so to hold, and in passing on the point (page 309) said:

“It must be admitted that, in order to hold the

receivers, they must be regarded as included in the word 'company'. Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the Legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel for the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the Legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

The Court then quotes with approval the rule, in such cases, as stated by Chief Justice Marshall, in **United States v. Wiltberger**, *supra*.

As this statute only authorized the institution of a criminal proceeding after there has been a willful violation of a notice given "by the Secretary of War", and it appearing that the notice in this case was not given by the "Secretary of War", our contention is that there has been no violation of the act, unless the Court shall, by construction, so enlarge the scope of the act as to make it embrace conditions and acts not mentioned therein.

In further support of our contention that penal statutes cannot be so broadened, by construction, as to make them reach beyond the fair meaning of the

words employed, we need only refer, in the briefest manner, to the text books on the subject.

In Bishop on Criminal Law (Sec. 114 and 115), the rule is stated as follows:

“The law delights in the life, liberty and happiness of the subject; and deems statutes which deprive him of these, or of his property, however necessary they may be, in a sense odious. Therefore, and for kindred reasons, as well as for the reason that every man should be able to know certainly when he is guilty of a crime, statutes which subject one to a punishment or penalty or forfeiture, or to a summary process calculated to take away his opportunity of making a full defense, or in any way depriving him of his liberty, are to be construed strictly. * * *

Such statutes are to reach no further in meaning than their words; no person is to be made subject to them by implication; and all doubts concerning their interpretation are too preponderate in favor of the accused.”

In re Enterprise (1st Payne 32) that Court (Livingston, Judge) said:

“The rule that penal statutes are to be strictly construed means that they ought not to be extended by their spirit or equity to other offenses than those which are clearly described and provided for.”

If this statute (section 18 of the Act of March 3rd, 1899) may, without the showing of any further legislation on the subject, be so enlarged by construction as to make it an offense to disregard a notice signed by one officer not mentioned therein, then why may not its provisions, by the same process, be so enlarged as to make it an offense not to obey a notice signed by a County Sheriff, a City Marshal, or a Deputy Constable.

V.

**The Parties Owning and Operating the Bridge Were
Not Given "a Reasonable Opportunity to Be
Heard" in the Sense in Which Those Words
Are Employed in the Act of March
3rd, 1899.**

The Record in this case shows (pages 149 to 201) that the so-called "hearing" was held at Rock Island, June 6th, 1905, before Major C. S. Riche of the Engineering Corps. The proceedings at that "hearing" consisted of reading the unverified replies received by Major Riche from the various persons to whom Major Lusk had previously propounded his interrogatories in the form shown, ante, at page.....

There were also read the *ex parte* affidavits of a number of persons, none of whom were present. But at no time were the owners of the bridge afforded an opportunity to **cross-examine** any of the persons interrogated by Major Lusk, or any of the persons whose *ex parte* affidavits were read at the "hearing".

The language of the statute is:

"It shall be the duty of said Secretary (the Secretary of War), first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same," etc.

The question presented is, as to whether the proceedings had at Rock Island designated as a "hearing", afforded the defendants "a reasonable **opportunity to be heard**", in the sense in which those words were employed by Congress in the act.

The word "hearing" and the words "reasonable opportunity to be heard" are not new in legislation; and when the power was conferred on the Secretary

of War to require changes to be made in bridges "after giving the parties interested reasonable opportunity to be heard", the presumption is that Congress intended that the words "reasonable opportunity to be heard" should be given exactly the same construction they had received when employed in former legislative enactments.

On this point the following cases serve to illustrate our contention:

In **People ex rel Keach v. Thompson** (94 N. Y. 451) the Court pointed out the difference between two sections of the Charter of the City of New York, relating to removals from office.

Section 25 provided that a party might be removed for cause "**after an opportunity to be heard**".

And Section 28 provided that an officer might be removed after being informed of the charges "and given an opportunity to explain".

After stating the case, the Court (page 466) said:

"From the authorities referred to we think there is no ground for the position that the same construction is to be placed on section 28 as was given to section 25 in the case of **People ex rel. Mayor v. Nichols**, 79 N. Y. 588, where it was held that the charges must be specified, and unless admitted must be proven to be true, with the right to the relator to cross-examine witnesses and call others, and in this and all other steps in the proceedings, to be represented by counsel. * * * In section 25 the removal is only to be had for cause **after an opportunity to be heard**, which implies that a hearing must be had, which is equivalent to a trial, as the case last cited holds. The language of this section is direct and peremptory. Under section 28 the officer is to be informed of the cause of removal, and be permitted—not to have a hearing or trial—but only an opportunity

to make an explanation in reference to the charges preferred.

There is a difference between a **hearing** and an explanation. The former may well import, as has been held, a **formal trial**, while the latter involves merely an oral or written statement as to the charges made, without that precision and formality which is required upon a hearing or a trial."

In **Mayor v. Nichols** (79 N. Y. 582) the facts were as follows:

Nichols was Police Commissioner, and the Charter of the city conferred on the Mayor the power to remove the Commissioner from office "for cause after opportunity to be heard".

In construing that statute the Court (page 588) said:

"The power is not an arbitrary one to be exercised at pleasure, but only upon just and reasonable grounds, and then not until after notice to the person charged, for in no other way could he have 'an opportunity to be heard.'

The proceeding, therefore, must be instituted upon specific charges sufficient in their nature to warrant the removal, and then unless admitted **be proven to be true**. Defendant might also **cross-examine** witnesses produced to support the charges, call others in his defense, and in these and other steps in the proceedings be represented by counsel. In no other way could the person sought to be removed have a due hearing, or 'an opportunity to be heard', and the condition must be complied with before the power of removal is exercised."

Now in this case (if it be conceded that this bridge was subject to the provisions of the act of March 3rd, 1899), then by that act the Secretary of War was required to give the parties interested in the bridge "**reasonable opportunity to be heard**" on the question

of whether the bridge was an unreasonable obstruction to the free navigation of the river, and on the authority of the cases above quoted, we contend that before the Secretary could find that issue against the bridge, two things were necessary:

1. The Secretary was required to have **proof** of the charge against the bridge; and,

2. The Secretary was required to afford the parties interested in the bridge an opportunity to **cross-examine** the witnesses relied upon to sustain the charge.

On the first of the above propositions we submit that the **unverified** answers received by Major Riche to the many letters sent out by Major Lusk did not constitute **proof** of anything.

And as to the right of the parties interested in the bridge to **cross-examine** the witnesses, we think it will hardly be contended that an **opportunity to cross-examine** was afforded, when not one of the parties whose letters or affidavits were read was present at the "hearing".

The "one-sided" manner in which the case against the bridge was made up in advance, and without any proof, and also the importance and value of the right to cross-examine witnesses in order to show their knowledge of the influences under which they testified, is clearly shown by an examination of the circulars and letters sent out by Major Lusk, who preceded Major Riche in charge of the case. The same circulars and letters were sent to all the so-called witnesses.

On pages 69 and 71 of the Record will be found copy of the circulars and interrogatories addressed by Major Lusk to Captain W. R. Tibbals, and others, and their replies to same. They were all in the same form and are as follows:

“U. S. Engineer Office,
Rock Island, Ill., March 25, 1905.
*Capt. W. R. Tibbals, Diamond Jo Line, Dubuque,
Iowa:*

DEAR SIR:—There have been referred to this office for action several petitions, addressed to the Secretary of War and signed by vessel-owners, masters, pilots and others interested in the navigation of the Upper Mississippi River. These petitions set forth that the bridge over the Mississippi River at Hannibal, Missouri, in its present condition, is an unreasonable obstruction to the free navigation of the said river, by reason of the location of the existing draw openings, the absence of guard fences or sheer booms, and the presence of artificial deposits of stone about the piers. The petitions request the Secretary of War, under the authority vested in him by law, and after a due hearing of all interested persons or corporations, to require such alterations to be made in and about the said bridge as will render navigation through it reasonably free, easy and unobstructed.

From the records of the former hearings and inquiries in regard to this bridge, it appears to be the prevailing opinion of navigators that the following changes in the Hannibal Bridge are necessary to afford suitable relief to navigation.”

Here follows a description of the proposed changes in the bridge in exactly the words of the notice afterwards signed by the Assistant Secretary of War.

“Such changes in the Hannibal Bridge as those described above are important, and to secure them congressional action may be required. It is therefore necessary that the presentation of the matter be made full and complete. To secure the needful information on this point I would ask for replies to the following questions, and also for such additional remarks as you may be willing to make.

JAS. L. LUSK,
Major, Corps of Engineers.”

INTERROGATORIES AND REPLIES.

“Sir: 1. Do your duties now, or have they in former years, required you to run boats, or tows, or rafts through the Hannibal Bridge, and are you familiar with the difficulties of navigation at that point?

Yes; tow boats and passenger boats of all descriptions, except rafts.

2. Do you consider the Hannibal Bridge in its present condition an unreasonable obstruction to navigation, and if so, why?

Yes, a very great obstruction. The location of the bridge in a very narrow point in the river, causing very much increase in the current at that point.

3. What do you consider the best plan for making the passage of the Hannibal Bridge more safe and convenient for all classes of navigation?

By moving the draw one-half span west, then by placing a sheer-boom above and below the shore pier.

4. Are you in favor of moving the draw to the west, so as to bring one opening next to or near the Missouri shore, and the building of guard fences or booms along that shore above, and if necessary below the shore draw opening?

Yes, very much.

5. Do you consider the Hannibal Bridge the **most dangerous** of the Upper Mississippi River bridges?

Yes, by a great deal.”

On that record, we seem to have a case in which a tribunal, designated by law to hear and decide a controversy involving an expenditure of hundreds of thousands of dollars, first announces its own opinion in the case to the witnesses selected and called by it to support a charge against one of the parties in interest. And, having done that, the tribunal then, by leading questions, secures the assent of its witnesses

to its own previously expressed opinion, and concludes the "hearing" by announcing that on the testimony the tribunal has found in favor of its own preconceived and previously announced judgment.

We doubt whether we have yet reached the point where property rights, such as are involved in this case, can be disposed of in that sort of a proceeding.

VI.

The Judgment Should Be Reversed, Because There Was a Fatal Variance Between Material Allegations of the Information and the Proof; the Allegation Being That the "Secretary of War" Gave the Notice, and the Proof Being That the "Assistant Secretary" Gave the Notice.

In order to make the information good, in form, it had to be charged "that the notice was given by the Secretary of War", because it is only when parties refuse to obey a notice from "the Secretary of War" that they violate the terms of the statute.

Had the information charged "that the notice was given by the Assistant Secretary", it would have been as foreign to everything contained in the statute, as would have been a charge "that the defendants had failed to comply with a notice given by the Mayor of Hannibal".

This point does not involve any inquiry respecting the **powers** of the Assistant Secretary of War. It involves only a rule of pleading and evidence that governs in all prosecutions under penal statutes.

That rule is, that if at the trial, the proof fails to support the allegations, the defendant must be discharged.

And, even if this statute had provided that the notice to alter the bridge might be given either "by the Secretary of War" or "by the Assistant Secretary of War", then a charge in a criminal information "that the notice was given by the Secretary of War", would not have been supported by proof that the notice was given "by the Assistant Secretary of War".

There is but one rule in such cases, and it is so familiar that we will only quote it as stated in a single opinion of this Court.

In **United States v. Hardyman** (37 U. S. 176) the indictment described a treasury note that had been stolen "as bearing interest, annually, at 1 per cent". At the trial, a treasury note bearing interest "at the rate of 1 mill per cent per annum" was offered in evidence by the Government, in support of the charge in the indictment.

The defendant moved to exclude it on the ground that it did not answer the description of any note set forth in the indictment.

The Circuit Court, thereupon, certified the case to this Court for its opinion as to the effect of the variance. In disposing of the point it was here said:

"The indictment does not profess to set out an exact recital of the note, but merely to give such a description of it as to make it evidence in the case. And this is all that the law requires. But the description, as far as it goes, must be accurate, so as to identify the note. Any substantial variance between the note described and the one offered in evidence must be fatal to the prosecution."

See also,

United States v. Cantril, 4th Cranch. 167.

VII.

**Neither the Act on Which the Prosecution Is Based
Nor the Act Creating the Office of Assistant Secretary
of War Advised the Defendants That
They Were Required to Obey a Notice
Signed by the Assistant Secretary.**

The act creating the office of Assistant Secretary of War conferred no powers or duties whatever on that officer.

That act was approved March 5, 1890, and consists of but a single section, which is as follows:

“Be it enacted that there shall be in the Department of War an Assistant Secretary, who shall be appointed by the President, by and with the advice of the Senate, and shall be entitled to a salary of \$4,500 a year, payable monthly, and who shall perform such duties in the Department as shall be prescribed by the Secretary, or which may be required by law.” (See Stats. 26 at large 17.)

If it can be said that the Assistant Secretary had any authority at all in the premises his power must have been derived either from the law or from the Secretary. But it cannot be said that the act creating the office conferred any power at all on that officer. His powers depended entirely on future legislation, or were to be derived from the Secretary.

**Defendants Were Not Required to Know What Powers
Were Conferred by the Secretary of War on
the Assistant Secretary.**

While it might be said that the defendants were bound to know the law, and that knowing the law they were required to take notice of the powers conferred **by law** on the Assistant Secretary, yet it cannot be said that the defendants were

either bound to know, or required to make inquiry respecting the powers **conferred on the Assistant Secretary by an order of the Secretary**. Those were matters that related only to the affairs of those engaged in that Department of the Government service. Regulations of that sort are not intended to regulate the affairs of the people throughout the country, nor are the people throughout the country required to take notice of the official powers conferred by any one executive officer of the Government upon another.

If it were seriously contended that in this case the Assistant Secretary of War derived his authority to give this notice from some order or rule prescribed by the Secretary, then it was clearly the duty of the Assistant Secretary to accompany his notice to the defendant **with a copy** of that rule or **order** of the Secretary. Otherwise, how could these defendants know what authority the Secretary had conferred on his "Assistant"?

But, as no authority from the Secretary to his Assistant accompanied the notice, and as the Act creating the office of "Assistant Secretary of War" confers on that officer **no power whatever**, it seems unnecessary to continue the discussion further.

VIII.

As to the Charge in the Information that the Bridge Was Not Constructed in Accordance With the Special Act of July 25th, 1866.

Both counts of the information contain the following charge (Record, page 2):

"That said railroad bridge was constructed under and by virtue of, and subject to, and authorized by an Act of Congress known as the Act of

July 25th, 1866: 'An Act to authorize the construction of certain bridges and to establish them as post roads;' wherein and whereby it is provided as follows, to-wit: 'That if any bridge built under this act shall be constructed, as a draw bridge, the same shall be constructed as a pivot draw bridge, with a draw over the main channel of the river at an accessible and navigable point and with spans of not less than 160 feet in length in the clear on each side of the central or pivot pier of the draw;' that said railroad bridge is and was at all times herein mentioned a pivot draw bridge, and as such has during all said time been an illegal and unlawful structure and an illegal and unlawful obstruction to navigation upon said river at said place, in this, to-wit: **That the spans of said bridge have been during all said time less than 160 feet in the clear on each side of the central or pivot pier of the draw of said bridge.**"

The Record contains absolutely no proof of that charge.

At no time, prior to the filing of the criminal information in the District Court, were the defendants ever called upon to answer an allegation to the effect that the bridge was not constructed, in all respects, in accordance with the special act of July 25th, 1866. That issue was tendered for the first time in the information, and the record does not show that either at the so-called "hearing" before Major Riche at Rock Island, or at the trial of the defendants in the District Court, there was one word of proof tendered in support of the charge.

What the Record Shows on That Point.

In a letter or report made January 12th, 1906, by C. W. Durham (who signed himself "Principal Assistant Engineer") to Major C. S. Riche of the Corps of Engi-

neers, the following statement appears at page 102 of the Record:

“Referring to the affidavit of T. M. Strain, Civil Engineer in charge of the Hannibal Bridge (page 39), and to the accompanying maps (to the correctness of which he testifies, Doc. 7), it would appear that the bridge is not a legal structure as regards clear width of draw-span, due in part to rip-rap obstructions.

Careful measurements on his profile show the following:

Measurements.	East draw	West draw
	span. feet.	span. feet.
Clear width at top	157.5	157.5
Clear width at high water	156.5	156.5
Clear width at stage 11.5	155.5	155.5
Clear width at low water	151.5	146.5
Clear width at 3 feet below low water	140.0	134.0
Clear width at 4½ feet below low water	135.0	132.0

And in a report made January 13th, 1908, by Major Riche to General Mackenzie, Chief of Engineers, the statement made by Mr. Durham is repeated (Record, page 111) in words as follows:

“As taken from the drawings submitted by Mr. T. M. Strain on behalf of the Bridge Company, and sworn to by him as correct and true, and as substantially verified by this office, the following are the **clear** openings on either side of the pivot pier:

At top of piers	east 157.5 ft., west 157.5 ft.
At high water	“ 156.5 “ “ 156.5 “
At 11.5 ft. stage	“ 155.5 “ “ 155.5 “
At low water	“ 151.5 “ “ 146.5 “
At 3 ft. below low water	“ 140.0 “ “ 134.0 “
At 4½ ft. below low water	“ 135.0 “ “ 132.0 “

Again, in a report made May 15th, 1906, by General George B. Davis (page 144), the above statements of Mr. Durham and Major Riche are referred to **as evidence** that the spaces between the piers of the draw span are not 160 feet in the clear.

But when we examine the reports of Mr. Durham and Major Riche we find that neither of them pretended to have had any knowledge whatever on the subject, aside from what they had derived from an examination of the alleged profile prepared by Mr. Strain.

Durham does not state that he **measured the bridge**. He only states that he **measured a profile prepared by Strain**.

The successive links, in this **chain of statements**, are as follows:

1. Strain is alleged to have made a profile.
2. Durham then states to Riche that he (Durham) had **measured the profile made by Strain**.
3. Riche then states to General Davis what Mr. Durham had stated to Riche.
4. General Davis then repeats what Major Riche had stated to him.

But we respectfully submit that the statements of Mr. Durham, Major Riche and General Davis, **respecting what they had said to each other**, regarding the profile made by Strain, were all mere hearsay, and constituted no proof of anything.

In conclusion, on this point, we repeat, that as the charge "that the bridge was not constructed in accordance with the Special Act of July 25th, 1866", was first made in the information filed in the District Court, it was the duty of the Government to produce Mr. Strain as a witness at the trial of the defendants in that court.

But Mr. Strain was not produced, nor is either his alleged profile or affidavit found in the record.

**The Defendant Produced Affirmative Evidence That
Bridge Was Constructed in Accordance With the
Special Act of July 25th, 1866.**

At the trial of the case in the District Court, the Government put in evidence (Record, page 84) a finding made by the Secretary of War in 1893, in which it was declared "that the bridge was constructed in the manner required by the Act of Congress authorizing its construction".

That finding was as follows:

“War Department,
Office of the Secretary.
Washington, Jan. 17, 1893.

It appears from the within papers that the Hannibal Bridge was constructed in the manner required by the Act of Congress authorizing the same; that there have been no serious accidents to boats at this bridge during the past ten or twelve years; that there has been no general demand by the river interests for any change in the bridge, but that there is a difference of opinion among those largely interested in the navigation of the river as to the necessity or utility of the proposed changes; that complaints made of the bridge have been based upon *ex parte* statements, and that the proposed reconstruction of the bridge would involve a great expense to those owning or operating the same, without positive assurance of permanent advantage to river interests; no order will be made requiring the reconstruction or improvement of such bridge, the same not being an 'unreasonable obstruction to the free navigation' of the river.

S. B. ELKINS,
Secretary of War.”

General Mackenzie Reported Bridge Constructed According to Special Act.

The defendants also, to rebut even the suggestion that the bridge was not a lawful structure, offered in evidence (but the same was excluded by the Court) a report made by Major Mackenzie of the Corps of Engineers, in 1892, in which he stated, after making a special survey, that the bridge **was constructed** in accordance with the special act. His statement on that point was as follows (Record, p. 264):

“While it is a simple matter to present the facts relating to the difficulties experienced by the interests of navigation in passing through the Hannibal Bridge, and to suggest the only plan, which appears to be a practical one, for overcoming these difficulties, it is more difficult to make recommendations as to how such changes of plan can be properly secured.

The Wabash Railroad Company do not own the Hannibal Bridge, but lease and operate it under conditions which would bring upon them the burden of any changes, which, under the law, devolves upon bridge companies. The Wabash Railroad Company make the claim that the Hannibal Bridge was built in exact accordance with the Act of Congress, approved July 25th, 1866. That such law compelled the Bridge Company to place the draw openings out in the stream and construct a raft span between such draw openings and the Missouri shore; and, that the difficulties which now exist, as result of the location of such draw, are the fault of the law and not of the Bridge Company. That the concentration of the river and excessive current at high stages result from the construction of the Sny Carte Levee, for which they are in no way responsible. That the act authorizing the construction of the Hannibal Bridge expressly reserved to Congress the right to require alterations or changes; and that, even conceding the present structure to be an unneces-

sary obstruction, it is nevertheless, as it stands, a legal structure, but that if changed, even for the betterment of navigation, without the action of Congress, the bridge would be an illegal structure. That the law of September 19th, 1890, authorizing the Secretary of War to order alterations in bridges, did not contemplate such a radical alteration as a change of location of draw.

The claim that the bridge was built in accordance with the law of July 25th, 1866, that the present difficulties are, partially at least, due to the requirements of the law, that the construction of the Sny Carte Levee is responsible for much of the trouble, are undoubtedly correct."

General Warren Reported Bridge Constructed According to Act.

The defendants offered in evidence (but the same was excluded by the Court) a certified copy of a report made in 1876 (in pursuance of an Act of Congress) by General W. K. Warren, at that time Chief of Engineers, in which he stated "that the draw span of the bridge was 360 feet over all, giving two clear openings of 160 feet". His statement on that point (Record, p. 269) was as follows:

"Description of the Bridge.

"On the Missouri side the bridge is approached through a short tunnel on a $9\frac{1}{2}$ degree curve, to which the bridge axis is tangent. The line of the bridge is at right angles with the general course of the river. The spans of the bridge commencing at the Missouri side are, first one 250 feet from centers of piers; then **a draw span 360 feet over all, giving two clear openings of 160 feet**; then one span 250 feet, and four of 180 feet each, making the total length of the bridge 1,580 feet."*

*The black letters are our own.

Therefore, the charge in the information, "that the bridge is an unlawful structure in this, to-wit: That the spans of said bridge have been, during all said time, less than 160 feet in the clear on each side of the central, or pivot pier, of the draw of said bridge," was wholly unsupported by evidence offered by the Government.

Not only that, but the contrary was shown by the reports of three of the highest officers of the Government, whose duty it has been to investigate and report on that very question.

In our presentation of this case we are not conscious of having questioned the soundness of anything heretofore decided by this Court in any case affecting the removal of any bridge over any navigable water of the United States. We have endeavored to confine our discussion to the case presented in this record, and, on this record, we respectfully submit that the judgment of the District Court should be reversed.

WELLS H. BLODGETT,

JAMES L. MINNIS,

GEORGE A. MAHAN,

*Counsel for Wabash Railroad
Company, Plaintiff in Error.*

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APPENDIX A.

THE INFORMATION.

United States of America, Northern Division of the
Eastern Judicial District of Missouri, ss:

In the District Court of the United States in and for the
Northern Division of Said District.

Be it Remembered, That on the Fourth day of June,
A. D. 1907, the following among other proceedings were
had, and appear of record in said court, to-wit:

The United States,

Plaintiff,

vs.

The Hannibal Bridge Company, The
Wabash Railroad Company, and
The Missouri Pacific Railway
Company,

Defendants.

314.

Now, at this day comes the United States by District Attorney, and moves the Court for an order, for leave to file information against The Hannibal Bridge Company, The Wabash Railroad Company, and the Missouri Pacific Railway Company, the defendants herein. Upon due consideration, it is ordered by the Court that such leave be granted. And now, comes said District Attorney and files information against said defendants, endorsed, to-wit: No. 314. In the United States District Court N. Div. E. Dist. of Mo. United States, v. The Hannibal Bridge Co., The Wabash Railroad Company and the Missouri Pacific Railway Co. Criminal Information. Violation of Act of March 3, 1899. (30 Stat.

L. 1153.) Filed June 4, 1907, in open court. Geo. C. Moore, Clerk.

Which said information is in words and figures as follows, to-wit:

United States of America, Eastern District of Missouri,
Northern Division.

In the District Court of the United States within and
for the Division and District aforesaid, at the May
Term of said court, in the year of our Lord One
Thousand Nine Hundred and Seven.

Henry W. Blodgett, attorney of the United States, for the Eastern District of Missouri, who in this behalf prosecutes in the name of the United States, and for the United States, comes here into said court on the 4th day of June, in the year of our Lord One Thousand Nine Hundred and Seven, in his own proper person, and for the United States, and states upon his oath and to the best of his information and belief, and gives the Court here to understand and be informed; that the Hannibal Bridge Company, the Wabash Railroad Company, and the Missouri Pacific Railway Company, are, each of them, corporations organized under and existing by virtue of the laws of the State of Missouri, and that each of said companies has been such a corporation continuously and without interruption for the period of time extending from the first day of May, in the year of our Lord One Thousand Nine Hundred and Five to the first day of May in the year of our Lord One Thousand Nine Hundred and Seven, and is now such corporation; that heretofore, to-wit, on the first day of May, in the year of our Lord One Thousand Nine Hundred and Five, at the County of Marion, in the division and district aforesaid, and within the jurisdiction of

this court, the aforesaid corporations owned and controlled a railroad bridge, commonly called the "Hannibal" or "Wabash" Bridge, over the Mississippi River, extending from the west or Missouri bank, in the said County of Marion, to the east, or Illinois bank of said river, said Mississippi River being then and there and at all times herein mentioned, a navigable waterway of the United States; that the aforesaid corporations have continuously owned and controlled said railroad bridge at said place, over said navigable waterway, from said first day of May in the year of our Lord One Thousand Nine Hundred and Five, up to the first day of May in the year of our Lord One Thousand Nine Hundred and Seven.

That said railroad bridge was constructed under and by virtue of, and subject to, and authorized by an act of Congress known as the Act of July 25th, 1866: "An Act to authorize the construction of certain bridges and to establish them as post roads"; wherein and whereby it is provided as follows, to-wit: "That if any bridge built under this Act shall be constructed as a draw-bridge, the same shall be constructed as a pivot draw-bridge, with a draw over the main channel of the river at an accessible and navigable point and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw"—that said railroad bridge is and was at all times herein mentioned a pivot draw-bridge, and as such has during all said time been an illegal and unlawful structure and an illegal and unlawful obstruction to navigation upon said river at said place in this, to-wit, that the spans of said bridge have been during all said time less than one hundred

and sixty feet in the clear on each side of the central or pivot pier of the draw of said bridge.

That, to-wit, on the first day of May, in the year of our Lord One Thousand Nine Hundred and Five, the Secretary of War, having good reason to believe, and believing, that said railroad bridge constructed and located as aforesaid, was an unreasonable obstruction to the free navigation of said Mississippi River, which in fact was and is true, in this, to-wit, on account of the unsuitable location of the draw-spans and protection cribs; the lack of suitable guard fences or sheer booms; and the presence of obstructing riprap around the piers of said bridge, and that there was difficulty in passing the draw opening or draw-spans of such bridge by rafts, steamboats or other water-crafts, caused a notice to be served upon each of the herein defendant corporations, notifying each of them as the owners and controllers of said railroad bridge, that it was proposed to require certain changes, to-wit, the changes enumerated and set forth in the notice contained herein, and set forth immediately below, to be made in said bridge, and that each of the herein defendant corporations would be given a reasonable opportunity to be heard in the matter.

Each of said notices, omitting the name of the person or corporation to whom the same was directed, was in substance and to the effect, as follows, to-wit:

“Whereas, the Secretary of War has good reason to believe that the bridge over the Mississippi River at Hannibal, Mo., commonly known as the Wabash Railway Bridge, is an unreasonable obstruction to the free navigation of the Mississippi River, on account of unsuitable location of the draw spans and protection

crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers. It is proposed to require the following changes to be made in said bridge by the first day of July, 1906, to-wit: As per attached slip:

‘The west draw-pier—(first pier from Missouri shore) to be converted into a pivot-pier; a new west draw-rest pier—to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot pier; and proper guard fences to be built along the Missouri shore above and below the new shore-pier.

Each of the draw-openings on the new location of draw-span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

The new and remodeled piers to be constructed as not to necessitate the use of rip-rap or either protection around their base, and as large a waterway as possible to be given between all new and remodeled piers.’

In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, in Room 28, at U. S. Engineer Office, Post Office Bldg., 16th St. and 2nd Ave., in Rock Island, Ill., at 10 o’clock a. m., on the sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision it will perhaps best

suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War.

C. S. RICHE,

Major, Corps of Engineers."

That thereafter, to-wit, on the 10th of March, in the year of our Lord One Thousand Nine Hundred and Six, each of the defendant corporations herein, at said time having had a reasonable opportunity to be heard on said proposed certain changes in said bridge, the Secretary of War gave notice to each of the defendant corporations herein, as the corporations owning and controlling the aforesaid railroad bridge, to alter the same so as to render navigation through or under it reasonably free, easy and unobstructed, and that in said notice the Secretary of War specified the changes recommended by the Chief of Engineers that were required to be made, to-wit, the changes enumerated and set forth in the notice contained herein and set forth immediately below, and therein said notice prescribed a reasonable time in which to make said specified changes recommended as aforesaid, which said reasonable time in which to make said specified changes recommended as aforesaid, was the period of time from the date of giving said notice up to and which expired on the fifteenth day of March, in the year of our Lord One Thousand Nine Hundred and Seven.

That the Secretary of War gave said notice to alter said bridge as aforesaid, to said defendant corporations, as the corporations owning and controlling said bridge, by serving upon each of said corporations a copy of a notice, which said notice, omitting the name

of the person or corporation to whom the same was directed, was in substance and to the effect as follows, to-wit:

“Take notice that:—

Whereas, the Secretary of War has good reason to believe that the draw-bridge, commonly known as the Wabash Railway Bridge, owned or operated by the Hannibal Bridge Company, *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable water-ways of the United States) on account of unsuitable location of the draw-spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers; there being difficulty in passing the draw-openings or draw-spans of such bridge by rafts, steamboats or other water craft.

And, whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy and unobstructed, to-wit:

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot pier; a new west draw-rest pier to be constructed near the Missouri shore;—the present pivot pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work, to be built above and below the new pivot pier; the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw-openings on the new location of draw-span to give at all stages of the river a clear

width of water-way of not less than one hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their bases, and as large a water-way as possible to be given between all new and remodeled piers;

And, whereas, To March 15th, 1907, is a reasonable time in which to alter the said bridge as described above.

Now, therefore, in obedience to, and by virtue of, section eighteen of an Act of the Congress of the United States entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes", approved March 3, 1899 (30 Stat. L. 1153), the Secretary of War hereby notifies the said Hannibal Bridge Company, the Wabash Railroad Company and the Missouri Pacific Railway Company, to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15th, 1907.

ROBERT SHAW OLIVER,

Ass't Secretary of War."

That after the expiration of such reasonable time, prescribed as aforesaid, in which to make said specified changes in said railroad bridge, recommended as aforesaid, that is, to-wit, upon the 16th day of March in the year of our Lord One Thousand Nine Hundred and Seven, the aforesaid alterations and changes in said railroad bridge recommended and specified as aforesaid, had not been made by the herein defendant corpo-

rations or any of them; but on the contrary each of said corporations owning and controlling said railroad bridge after receiving the aforesaid notice from the Secretary of War, to make said alterations and changes in said railroad bridge, specified and recommended as aforesaid, within the reasonable time prescribed by the Secretary of War, as aforesaid, did, unlawfully and wilfully fail and refuse to make said alterations and changes in said railroad bridge specified and recommended as aforesaid, within the reasonable time prescribed by the Secretary of War, as aforesaid, and that each of the said defendant corporations did therein and thereby unlawfully and wilfully fail and refuse to comply with the lawful order of the Secretary of War in the premises, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States.

Wherefore, said attorney, in behalf of the United States, prays the consideration of the Court herein the premises, and that due process of law may be awarded against the said Hannibal Bridge Company, the Wabash Railroad Company, and the Missouri Pacific Railway Company in this behalf.

Second Count.

In the District Court of the United States, within and for the Division and District aforesaid, at the May Term of said Court, in the Year of Our Lord One Thousand Nine Hundred and Seven.

Henry W. Blodgett, Attorney of the United States, for the Eastern District of Missouri, who in this behalf prosecutes in the name of the United States, and for the United States, comes hereinto this Court on this 4th day of June, in the year of our Lord One Thousand

Nine Hundred and Seven, in his own proper person, and for the United States, and further states upon his oath and to the best of his information and belief, and gives the Court here to understand and be informed; that the Hannibal Bridge Company, the Wabash Railroad Company and the Missouri Pacific Railway Company, are, each of them, corporations organized under and existing by virtue of the laws of the State of Missouri, and that each of said companies has been such a corporation continuously and without interruption for the period of time extending from the first day of May, in the year of our Lord One Thousand Nine Hundred and Five to the first day of May in the year of our Lord One Thousand Nine Hundred and Seven, and is now such corporation; that heretofore, to-wit, on the first day of May, in the year of our Lord One Thousand Nine Hundred and Five, at the County of Marion, in the Division and District aforesaid, and within the jurisdiction of this Court, the aforesaid corporations owned and controlled a railroad bridge, commonly called the "Hannibal" or "Wabash" Bridge, over the Mississippi River, extending from the west or Missouri Bank, in the said County of Marion, to the east or Illinois bank of said river, said Mississippi River being then and there and at all times herein mentioned, a navigable waterway of the United States; that the aforesaid corporations have continuously owned and controlled said railroad bridge at said place, over said navigable waterway from said first day of May in the year of our Lord One Thousand Nine Hundred and Five, up to the first day of May in the year of our Lord One Thousand and Nine Hundred and Seven.

That said railroad bridge was constructed under, by virtue of, and subject to, and authorized by an Act of

Congress known as the Act of July 25, 1866, "An Act to authorize the construction of certain bridges and to establish them as post roads"; wherein and whereby it is provided as follows, to-wit: "That if any bridge built under this Act shall be constructed as a draw-bridge, the same shall be constructed as a pivot draw-bridge, with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty (160) feet in length in the clear on each side of the central or pivot pier of the draw";—that said railroad bridge is and at all times herein mentioned was, a pivot draw bridge, and as such has during all said time been an illegal and unlawful structure and an illegal and unlawful obstruction to navigation upon said river at said place in this, to-wit, that the spans of said bridge have been during all said time less than one hundred and sixty feet in the clear on each side of the central or pivot pier of the draw of said bridge.

That, to-wit, on the first day of May, in the year of our Lord One Thousand Nine Hundred and Five, the Secretary of War, having good reason to believe, and believing, that said railroad bridge constructed and located as aforesaid, was an unreasonable obstruction to the free navigation of said Mississippi River, which in fact was and is true, in this, to-wit, on account of the unsuitable location of the draw-spans and protection cribs; the lack of suitable guard fences or sheer booms; and the presence of obstructing rip-rap around the piers of said bridge, and that there was difficulty in passing the draw openings or draw-spans of such bridge by rafts, steamboats or other watercraft, caused a notice to be served upon each of the herein defendant corporations, notifying each of them as the owners and

controllers of said railroad bridge, that it was proposed to require certain changes, to-wit, the changes enumerated and set forth in the notice contained herein, and set forth immediately below, to be made in said bridge, and that each of the herein defendant corporations would be given a reasonable opportunity to be heard in the matter.

Each of said notices, omitting the name of the person or corporations to whom the same was directed, was in substance and to the effect as follows, to-wit:

“Wherefore, the Secretary of War has a good reason to believe that the bridge over the Mississippi River at Hannibal, Mo., commonly known as the Wabash Railway Bridge, is an unreasonable obstruction to the free navigation of the Mississippi River, on account of unsuitable location of the draw-spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers. It is proposed to require the following changes to be made in said bridge by the first day of July, 1906, to-wit: As per attached slip.

“The west draw-pier (first pier from Missouri shore) to be converted into a pivot-pier; a new west drawrest-pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers, of crib-work to be built above and below the new pivot-pier; and proper guard fences to be built along the Missouri shore above and below the new shore pier.

“Each of the draw-openings on the new location of draw-span to give at all stages of the river a clear width of waterway, available for boats drawing 6 feet of water, of not less than 160 feet.

“The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their base, and as large a waterway as possible to be given between all new and remodeled piers.

In order to give you an opportunity to be heard as required by the Act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, in room 28, at U. S. Engineer Office, Post Office Bldg., 16th St. and 2nd Ave., in Rock Island, Ill., at 10 o'clock A. M., on the sixth day of June, 1905, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision, it will perhaps best suit your purpose to submit in writing whatever you may wish to present.

By authority of the Secretary of War:

C. S. RICHE,

Major, Corps of Engineers.”

That thereafter, to-wit, on the 10th day of March, in the year of our Lord One Thousand Nine Hundred and Six, each of the defendant corporations, herein, at said time having had a reasonable opportunity to be heard on said proposed certain changes in said bridge, the Secretary of War gave notice to each of the defendant corporations herein, as the corporation owning and controlling the aforesaid railroad bridge, to alter the same so as to render navigation through or under it reasonably free, easy and unobstructed, and that in said notice the Secretary of War specified the changes recommended by the Chief of Engineers that were required to be made, to-wit, the changes enumerated and set forth in the notice contained herein and set forth immediately below, and therein said notice prescribed a

reasonable time in which to make said specified changes recommended as aforesaid, which said reasonable time in which to make such specified changes recommended as aforesaid, was the period of time from the date of giving said notice up to and which expired on the fifteenth day of March, in the year of our Lord One Thousand Nine Hundred and Seven.

That the Secretary of War gave said notice to alter said bridge as aforesaid, to said defendant corporations, as the corporations owning and controlling said bridge, by serving upon each of said corporations a copy of a notice, which said notice, omitting the name of the person or corporation to whom the same was directed, was

"Take Notice That

Whereas, the Secretary of War has good reason to believe that the draw-bridge commonly known as the Wabash Railway bridge, owned or operated by the Hannibal Bridge Company, *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation to the said Mississippi River (which is one of the navigable waterways of the United States) on account of unsuitable location of the draw-span and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers; there being difficulty in passing the draw-openings or draw-spans of such bridge by rafts, steamboats, or other watercraft;

And, whereas, the following alterations which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy and unobstructed, to-wit:

(a) The west draw-rest pier (first pier from Mis-

souri shore) to be converted into a pivot-pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot-pier to be cut down and converted into an east draw-rest pier; the present draw-span to be moved west; new and solid long or protection piers of crib work, to be built above and below the new pivot-pier; the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw openings on the new locations of draw-span to give at all stages of the river a clear width of waterway of not less than one hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers;

And, whereas, To March 15th, 1907, is a reasonable time in which to alter the said bridge as described above;

Now, therefore, In obedience to, and by virtue of, Section eighteen of an Act of the Congress of the United States entitled 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes' approved March 3rd, 1899 (30 Stat. L. 1153), the Secretary of War hereby notifies the said Hannibal Bridge Company, the Wabash Railroad Company, and the Missouri Pacific Railway Company, to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15th, 1907.

ROBERT SHAW OLIVER,

Ass't Secretary of War."

That after the expiration of the period of one month after the expiration of such reasonable time prescribed as aforesaid in which to make said specified changes in said railroad bridge, recommended as aforesaid, that is, to-wit, upon the first day of May in the year of our Lord One Thousand Nine Hundred and Seven, the aforesaid alterations and changes in said railroad bridge recommended and specified as aforesaid, had not been made by the herein defendant corporations, or any of them; but on the contrary each of said corporations owning and controlling said railroad bridge after receiving the aforesaid notice from the Secretary of War, to make said alterations and changes in said railroad bridge, specified and recommended as aforesaid, within the reasonable time prescribed by the Secretary of War, as aforesaid, did, unlawfully and wilfully fail and refuse to make said alterations and changes in said railroad bridge specified and recommended as aforesaid, for the period of one month after the expiration of the reasonable time prescribed by the Secretary of War, as aforesaid, and that each of the said defendant corporations did therein and thereby unlawfully and wilfully fail and refuse to comply with the lawful order of the Secretary of War in the premises, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States.

Wherefore, said attorney, in behalf of the United States, prays the consideration of the Court here in the premises, and that due process of law may be awarded against the said Hannibal Bridge Company, the Washash Railroad Company, and the Missouri Pacific Railway Company in this behalf.

HENRY W. BLODGETT,

*United States Attorney for the
Eastern District of Missouri.*

Subscribed and sworn to before the undersigned on this 15th day of May in the year of our Lord One Thousand Nine Hundred and Seven.

[SEAL]

W. W. NALL,

Clerk of the District Court of the United States for the Eastern Division, Eastern District of Missouri.

APPENDIX B.

Act of July 25, 1866 (14 Statutes at Large, Page 244) Under Which Bridge Was Erected.

(An Act to Authorize the Construction of Certain Bridges, and to Establish Them as Post Roads.)

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That it shall be lawful for any person or persons, company or corporation, having authority from the States of Illinois and Missouri for such purpose, to build a bridge across the Mississippi River at Quincy, Illinois, and to lay on and over said bridge railway tracks, for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge, under the limitations and conditions hereinafter provided. And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the District Court of the

United States of any state in which any portion of said obstruction or bridge touches.

SECTION 2. *And Be It Further Enacted*, That any bridge built under the provisions of this act may, at the option of the company building the same, be built as a draw-bridge with a pivot or other form of draw, or with unbroken or continuous spans; *Provided*, That if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation in any case than fifty feet above extreme highwater mark, as understood at the point of location to the bottom chord of the bridge, nor shall the spans of said bridge be less than two hundred and fifty feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river and not less than three hundred feet in length; *And Provided Also*, That if any bridge built under this act shall be constructed as a draw-bridge, the same shall be constructed as a pivot drawbridge with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw, and the next adjoining spans to the draw shall not be less than two hundred and fifty feet; and said spans shall not be less than thirty feet above low-water mark, and not less than ten above extreme high-water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current of the river; *And Provided Also*, That said draw shall be opened promptly upon reasonable signal for the passage of boats, whose construction shall not be such as to admit of their passage under the permanent spans of said bridge, except

when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw during or after the passage of trains.

SECTION 3. *And Be It Further Enacted*, That any bridge constructed under this act, and according to its limitations, shall be a lawful structure and shall be recognized and known as a post route; upon which also no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge.

SECTION 4. *And Be It Further Enacted*, That it shall be lawful for the Chicago, Burlington and Quincy Railroad Company, a corporation whose road has been completed to the Mississippi River, and connects with a railroad on the opposite side thereof, having first obtained authority therefor from the States of Illinois and Iowa, to construct a railroad bridge across said river, upon the same terms, in the same manner, under the same restrictions, and with the same privileges, as is provided for in this act in relation to the bridge at Quincy, Illinois.

SECTION 5. *And Be It Further Enacted*, That a bridge may be constructed at the Town of Hannibal, in the State of Missouri, across the Mississippi River, so as to connect the Hannibal and Saint Joseph Railroad with the Pike County and Great Western Railroads of Illinois, on the same terms and subject to the same restrictions as contained in this act for the construction of the bridge at Quincy, Illinois.

SECTION 6. *And Be It Further Enacted*, That a bridge may be constructed across the Mississippi River between Prairie du Chien, in the State of Wisconsin,

and North McGregor, in the State of Iowa, with the consent of the legislatures of Wisconsin and Iowa, on the same terms and subject to the same restrictions as are contained in this act for the construction of the bridge at Quincy, Illinois.

SECTION 7. *And Be It Further Enacted*, That the Keokuk and Hamilton Mississippi Bridge Company, a corporation existing under the laws of the State of Iowa, and the Hancock County Bridge Company, a corporation existing under the laws of the State of Illinois, be and are hereby authorized to construct and maintain a bridge over the Mississippi River between Keokuk, Iowa, and Hamilton, Illinois, of the same character, description, and construction as provided in this act for the bridges at Quincy and Burlington; and the said bridge, in its use and operation, shall be subject to the same restrictions that apply to said bridges at Quincy and Burlington by the terms of this act.

SECTION 8. *And Be It Further Enacted*, That the Winona and Saint Peter Railroad Company, a corporation existing under the laws of the State of Minnesota, is hereby authorized to construct and operate a railroad bridge across the Mississippi River between the City of Winona, in the State of Minnesota, and the opposite bank of the said river, in the State of Wisconsin, with the consent of the legislatures of the States of Minnesota and Wisconsin; and said bridge by this section authorized is hereby declared a post route, and subject to all the terms, restrictions, and requirements contained in the foregoing sections of this act.

SECTION 9. *And Be It Further Enacted*, That a bridge may be constructed and maintained across the Mississippi River, between Dunleith, in the State of Illinois, and Dubuque, in the State of Iowa, with the

consent of said states previously given or hereafter acquired, with the same privileges, upon the same terms, and under the same restrictions as are contained in this act for the construction of a bridge at Quincy, Illinois.

SECTION 10. *And Be It Further Enacted*, That any company authorized by the legislature of Missouri may construct a bridge across the Missouri River, at the City of Kansas, upon the same terms and conditions provided for in this act.

SECTION 11. *And Be It Further Enacted*, That the "Saint Louis and Illinois Bridge Company", a corporation organized under an act of the General Assembly, of the State of Missouri, approved February fifth, eighteen hundred and sixty-four, and an act amendatory of the same, approved February twentieth, eighteen hundred and sixty-five, and also confirmed in its corporate powers under an act of the Legislature of the State of Illinois, approved eighteen hundred and sixty-four, or any other bridge company organized under the laws of Missouri and Illinois, be, and the same is hereby, empowered to erect, maintain and operate a bridge across the Mississippi River, between the City of Saint Louis, in the State of Missouri, and the City of East Saint Louis, in the State of Illinois, subject to all the conditions contained in said act of incorporation and amendments thereto, and not inconsistent with the following terms and provisions contained in this act. And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said waters, the cause may be tried before the District Court of the United States of any state in which any portion of said obstruction or bridge touches.

SECTION 12. *And Be It Further Enacted*, That the

bridge authorized by the preceding section to be built shall not be a suspension bridge, or draw-bridge, with pivot or other form of draw, but shall be constructed with continuous or unbroken spans, and subject to these conditions: First, that the lowest part of the bridge or bottom chord shall not be less than fifty feet above the city directrix at its greatest span. Second, that it shall have at least one span five hundred feet in the clear, or two spans of three hundred and fifty feet in the clear of abutments. If the two latter spans be used, the one over the main steamboat channel shall be fifty feet above the city directrix, measured to the lowest part of the bridge at the center of the span. Third, no span over the water at low-water mark, shall be less than two hundred feet in the clear of abutments.

SECTION 13. *And Be It Further Enacted*, That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved.

Approved July 25, 1866.

APPENDIX C.

Act of March 3rd, 1899, Under Which This Case Is Prosecuted.

An Act Making Appropriation for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes.

SECTION 18. That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be con-

structed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so as to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation or

association so offending to the penalties above prescribed: *Provided*, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court, either by the United States or by the defendants.

Approved March 3, 1899.

APPENDIX D

Act of August 11th, 1888 (25 Statute at Large, Pages 424-5) Under Which the Proceedings Were Had in United States Against Keokuk Bridge Company (45 Fed. 178.)

An Act Making Appropriations for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes.

SECTION 9. That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an obstruction to the free navigation of such waters, by reason of insufficient height, width of span or otherwise, or where there is difficulty in passing the draw-opening or the raft-span of such bridge by rafts, steamboats or other water craft, it shall be the duty of the said Secretary to give notice to the persons or corporations owning or controlling such bridge to so alter the same as to render navigation through or under it free, easy and unobstructed; and in giving such notice he shall prescribe in each case a reasonable time in which such alteration is to be made. If, at the end of such time, the alteration has not been

made, the Secretary of War shall forthwith apprise the Attorney General of the United States, whose duty it shall be to institute suit, in the name of the United States, without delay, in the circuit or district court of the United States for the circuit in which such bridge is located, which court is hereby invested with jurisdiction for this purpose, to recover from the owners or managers of such bridge the fines mentioned in the succeeding sections of this act.

SECTION 10. That the owner or owners or manager or managers of any railroad or other bridge obstructing the free navigation of any navigable waterway of the United States who shall willfully fail or refuse to remove the same, or to cause the necessary alterations to be made in the same so as to render navigation through or under it free, easy and unobstructed to rafts, steamboats, or other water-craft, after receiving notice to that effect from the Secretary of War and within the time prescribed by him, shall be subject to a fine as penalty therefor of five hundred dollars per month for the time he or they are in default, and the amount so recovered shall be placed to the credit of the improvement fund of the waterway obstructed by such bridge.

Approved August 11th, 1888.

APPENDIX E.

Act Creating Office of Assistant Secretary of War.

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That there shall be in the Department of War an Assistant Secretary of War, who shall be ap-

pointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of four thousand five hundred dollars a year, payable monthly, and who shall perform such duties in the Department of War as shall be prescribed by the Secretary or may be required by law.

Approved March 5, 1890.



Office Supreme Court, U. S.

FILED

DEC 27 1910

JAMES H. MCKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 100.

HANNIBAL BRIDGE COMPANY and WABASH
RAILROAD COMPANY,
Plaintiffs in Error,

against

THE UNITED STATES,
Defendant in Error.

Brief for Hannibal Bridge Company.

R. BURNHAM MOFFAT,
Attorney and Counsel for
Hannibal Bridge Company,
Plaintiff in Error.



Supreme Court of the United States.

HANNIBAL BRIDGE COMPANY and
WABASH RAILROAD COMPANY,
Plaintiffs in error,

AGAINST

THE UNITED STATES,
Defendant in error.

October Term, 1910.

No. 100.

Brief for Hannibal Bridge Company, Plaintiff in Error.

This case comes up on writ of error to the District Court of the United States for the Northern Division of the Eastern District of Missouri, (page 318), and presents for review a verdict of "guilty" rendered upon the trial of a criminal information filed against the plaintiffs in error, the Hannibal Bridge Company and the Wabash Railroad Company,—both being corporations of the State of Missouri,—at the May, 1908, term of said District Court, sitting at Hannibal, Missouri, and presided over by Hon. DAVID P. DYER, District Judge.

Statement.

The proceeding was brought as for a violation of Sec. 18 of the *Act of March 3, 1899*, (30 Stat. L. 1,153). The statute is set forth at length at pages 40-41 of the record, and provides in substance that whenever the Secretary of War has good reason to believe that a railroad or

other bridge over any of the navigable waterways of the United States (1) is an *unreasonable obstruction* to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or (2) where there is *difficulty in passing the draw opening* or the draw span of such bridge by rafts, steamboats or other watercraft, it shall be the duty of the Secretary of War, after giving the parties reasonable opportunity to be heard, to notify the persons or corporations owning or controlling the bridge to alter it in such manner as to render navigation through or under it reasonably free, easy and unobstructed. The statute particularly prescribes that the notice shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe a reasonable time within which to make them; and that if the persons or corporations owning or controlling the bridge shall, "*after receiving notice to that effect as hereinabove required from the Secretary of War,*" wilfully fail or refuse to comply with the *lawful* order of the Secretary of War in the premises, such persons or corporations shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$5,000., and that each month during which the default shall continue shall be deemed to be a separate offense. The act further provides that in any case arising under its provisions an appeal or writ of error may be taken by either party from the district court directly to the Supreme Court.

An information was filed by the district attorney against the defendants below on June 4, 1907, and will be found at pages 1-10 of the record. It contains two counts, which are identical in form except that the second count is designed to set forth the separate offense

that would arise under the statute where an alleged default continues for a second month.

The defendants were summoned and appeared by their respective counsel and filed a demurrer to the information (pages 16-17); but their demurrer was overruled (page 18), the court handing down a written opinion which will be found at pages 40-46 of the record.

The Government's case consisted of

(1) Testimony tending to prove the ownership or control of the bridge by the defendants below (pages 56-69);

(2) Proof of the Act of July 25, 1866, authorizing the construction of the bridge—on the theory that the statute might be regarded as a private act (page 69);

(3) A certified copy of the voluminous record of the proceedings had by the War Department which culminated in the notice or order of March 10, 1906, (pages 4-5) to alter the bridge (pages 75-246); and

(4) Testimony tending to show that the bridge was in precisely the same condition, so far as alterations were concerned, on the day of the trial as it had been at the time of the making of the notice of March 10, 1906.

No competent proof was offered by the Government tending to show that any of the defendants below had ever been served with or received the notice or order requiring them to make the alterations, notwithstanding that the giving of such notice is by the Act of 1899 expressly made a condition precedent to a conviction under the statute. The defendants were convicted in a criminal proceeding as for a wilful failure to comply with a

notice or order, of the requirements of which, so far as any competent evidence in the case tended to show, they were both actually and constructively in ignorance.

The court admitted in evidence, over the objections and exceptions of the defendants below, duly noted at the time (pages 127-137), certified copies of affidavits on file in the War Department at Washington setting forth that upon certain stated dates,—subsequent, of course, to the making of the notice to alter,—a copy of the notice had been served upon each of the defendants below. Defendants' counsel insisted upon their *right*, before adjudged guilty of a crime, to be confronted with the witnesses against them; but the learned judge ruled that "Congress has made a certified copy of the records "in the War Department competent evidence in any civil "or criminal case, when properly certified here" (page 132), and held the certified copies to be competent proof of the service. It was pointed out to the learned court (page 137) that the Act of Congress did not and could not give to the *copy* any greater probative force than the original affidavit might possess, and that under the constitutional right of one charged with a crime to be confronted with the witnesses against him, the affidavit itself would, upon objection, be manifestly incompetent as proof of the facts therein set forth. But the objection was overruled and the court adhered to its decision (page 137); and such ruling was duly assigned by defendants below as error (Assignments IV and V, pages 300-301).

Defendants' case, after denial of their motion for the direction of a verdict of acquittal (pages 246-251), was directed (pages 256-257) toward showing that the notice of March 10, 1906, was not, as the statute required it

should be, a *lawful* or reasonable order, in that it required defendants below not merely to make alterations in the bridge itself but to go further and at their own expense to excavate out of the rock a new channel for the river, which requirement, it was urged upon the court, was not and could not be conferred by Congress upon the Secretary of War or upon any other official (pages 275-277, 280). But the learned judge summarily refused to take *any* evidence offered by defendants, observing "I shall hold that the order of the Secretary of War, made in this particular case, should have been obeyed. If it could not be obeyed,—I am not going to sit here and hear whether it could or could not" (page 257).

Various other errors were committed by the learned trial judge to the substantial prejudice of the plaintiffs here; and they will be considered in the argument below.

Specification of Errors.

An Assignment of Errors was filed with the petition for the writ, and is printed at pages 297-308 of the record. All errors there assigned, with the exception of assignments numbered I, XVII and XVIII (pages 306-307), are urged by the Hannibal Bridge Company upon the attention of this court; and to comply with Rule XXI of this Court, as we understand its requirements, we reprint those Assignments here at length.

II.

The court erred in admitting in evidence the certified copy of the notice of March 10, 1906, addressed to the Hannibal Bridge Company in the following words and figures, and the certified copy of the notice of the same date addressed to the Wabash Railroad Company in substantially the same words and figures, that is to say:

“War Department,
Washington City, March 10, 1906.

Take notice that:

Whereas, The Secretary of War has good reason to believe that the draw bridge, commonly known as the Wabash Railway Bridge, owned or operated by the Hannibal Bridge Company (and by the Wabash Railroad Company), *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable waterways of the United States) on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing rip-rap around the piers, there being difficulty in passing the draw openings or draw spans of such bridge by rafts, steamboats, or other water craft,

And whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy, and unobstructed, to-wit:

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot-pier, a new west draw-rest pier to be constructed near the Missouri shore, the present pivot-pier to be cut down and converted into an east draw-rest pier, the present draw-span to be moved west, new and solid long or protection piers, of crib work, to be built above and below the new pivot piers, the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw openings on the new location of draw span to give at all stages of the river a clear width of waterway of not less than one hun-

dred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of rip-rap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers;

And whereas, to March 15, 1907, is a reasonable time in which to alter the said bridge as described above;

Now, therefore, in obedience to, and by virtue of, section eighteen of an Act of the Congress of the United States entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, (30 Stat. L. 1153), the Secretary of War hereby notifies the said Hannibal Bridge Company (and the said Wabash Railroad Company) to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15, 1907.

ROBERT SHAW OLIVER,
Ass't Secretary of War."

for the reasons that:

(1) Neither of the paper writings offered proves or tends to prove any material allegation or charge contained in the information and is not a notice given or signed by the Secretary of War;

(2) The Secretary of War could not lawfully delegate to the Assistant Secretary of War the duty and discretion reposed in him by section 18 of the River and Harbor Act approved March 3, 1899;

(3) There was a variance between the allegations con-

tained in the information and in said paper writings in this, to-wit: The information charges that the Secretary of War gave notice to the defendant corporations, as parties owning and operating the bridge, to alter the same so as to render navigation through and under it reasonably free, easy and unobstructed; whereas neither of said paper writings requiring the defendants to alter the bridge in the manner aforesaid, was a notice signed, given or promulgated by the Secretary of War;

(4) The Assistant Secretary of War was and is authorized by law to perform only such duties as were prescribed by the Secretary of War or were required by law; and there was not and never had been any law authorizing any Assistant Secretary of War to give notice to any person or persons or corporation owning or controlling any bridge over any of the navigable waters of the United States, to alter the same in any respect, nor had the Secretary of War at or before the date of said paper-writings, or at or before the alleged delivery of a copy thereof to the defendants, or to any of them, ever directed or prescribed it as the duty of any Assistant Secretary of War to give notice to any person, persons or corporation, owning or operating any bridge over any of the navigable waters of the United States, to alter the same or to direct or require them to alter the same in any manner whatsoever;

(5) The evidence introduced by the Government showed affirmatively that the Secretary of War did not give consideration to the matter, did not exercise the discretion reposed in him by the Act of March 3rd, 1899, did not make any notice to alter, did not approve any findings of any subordinate or subordinates in his department, did not pass upon any recommendations made by any sub-

ordinate, and did not give any notice to any of the defendants.

(6) The paper-writings of March 10, 1906, signed "Robert Shaw Oliver, Assistant Secretary of War," did not specify or describe the alterations required to be made in the bridge with such certainty as would enable the defendants to comply therewith, in this, that said paper writings, among other things, state that new, solid, long or protection piers, of crib work, shall be built above and below the new piers, whereas the length of the protection piers required to be built by the defendants is nowhere stated in said paper-writings;

(7) The said paper-writings did not state the alterations required to be made in said bridge so as to enable the defendants to comply with the same, in this, that while said paper writings, among other things, state that proper guard fences shall be built along the Missouri shore above and below the new shore pier, they nowhere state the length, height or width of said guard fences, or state what would constitute or be regarded by the Secretary of War as proper guard fences, either above or below the proposed new shore pier when made.

III.

The Court erred in admitting in evidence the certified copy of the letter of Major C. S. Riche to Brig. Gen. A. MacKenzie of March 28, 1906, wherein the writer stated that on March 17th a duplicate of the notice of March 10, 1906, was served on the Secretary and Treasurer of the Hannibal Bridge Company, and that an affidavit covering the facts in the case had been made by Mr. Dunn, the individual who had served the paper, for the reasons that:

(1) Said letter was not competent proof of the facts therein stated;

(2) Said letter did not tend to prove the service of the notice of March 10, 1906, as therein stated;

(3) Said letter was immaterial for any purpose because written subsequently to the making of the notice of March 10, 1906, and did not tend to prove any of the allegations charged in the information.

IV.

The court erred in admitting in evidence the certified copies of the three affidavits of James C. Dunn, sworn to respectively on March 24, 1906, March 27, 1906, and March 17, 1906, in each of which affidavits the affiant deposed that on March 17, 1906, he had made service of the notice of March 10, 1906, upon the Hannibal Bridge Company by personally delivering a duplicate thereof to the Secretary and Treasurer of said Company at his residence in Brooklyn, N. Y., for the reasons that:

(1) Said affidavits were not competent proof of the facts therein set forth;

(2) Said affidavits did not competently tend to prove the service of the notice of March 10, 1906, upon the defendant, The Hannibal Bridge Company;

(3) The defendants were entitled by law to be confronted with the witnesses against them in a criminal proceeding with the right to cross examine said witnesses and could not be deprived of such rights by the substitution of affidavits in place of the oral testimony of such witnesses.

V,

The court erred in admitting in evidence the certified copy of the affidavit of W. H. Bixby, sworn to March 17, 1906, in which affidavit the affiant deposed that on March 16, 1906, he had made service of the notice of March 10, 1906, upon the Wabash Railroad Company by personally delivering a duplicate thereof to F. A. Delano, the president of said Company, at the Western Union Building, Chicago, Ill., for the reasons that:

(1) Said affidavit was not competent proof of the facts therein set forth:

(2) Said affidavit did not competently tend to prove the service of the notice of March 10, 1906, upon the defendant, the Wabash Railroad Company;

(3) The defendants were entitled by law to be confronted with the witnesses against them in a criminal proceeding with the right to cross-examine said witnesses and could not be deprived of such rights by the substitution of affidavits in place of the oral testimony of such witnesses.

VI.

The court erred in admitting in evidence the certified copy of the letter of March 23, 1906, addressed to Hon. William H. Taft, Secretary of War, and signed "N. H. Swayne," stating among other things that, without a hearing by the Secretary of War, a notice signed by Gen. Oliver, Assistant Secretary of War, dated March 10 1906, had been served on the Bridge Company and on the Wabash Railroad Company, ordering certain changes in the bridge at an estimated cost of \$160,000, and requesting that inasmuch as "we have not had a hearing by you,

provided for by law and asked for by us," the order of March 10, 1906, made by Gen. Oliver should be annulled and that a hearing be granted by the Secretary of War at a date to be fixed, for the reasons that:

(1) Said letter was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations charged in the information;

(2) There was no competent proof that N. H. Swayne was an authorized representative of the defendants or of either of them.

VII.

The court erred in admitting in evidence the certified copy of the endorsement on said letter of March 23, 1906, addressed to Hon. William H. Taft, Secretary of War, and signed "N. H. Swayne," said endorsement being in words and figures following:

War Department,

Office of the Secretary

Memorandum for the Chief of Engineers.

Letter of N. H. Swayne in re matter of the Hannibal Bridge across the Mississippi River at Hannibal, Mo.

The Secretary of War desires to give a hearing in this case.

March 26, 1906.

FRED CARPENTER,

Private Secretary."

for the reasons that the same was written subsequently to the making and issuance of the order of March 10, 1906, and did not tend to prove any of the allegations charged in the information.

VIII.

The court erred in admitting in evidence the certified copy of the second endorsement on said letter of March 23, 1906, signed "N. H. Swayne" and addressed to Hon. William H. Taft, Secretary of War, which endorsement bears date of March 28, 1906, and is signed "A. Mackenzie, Brig. Gen., Chief of Engineers, U. S. Army," and is in the words and figures following:

"1. Respectfully returned to the Secretary of War.

2. The hearing in the matter of the Hannibal Bridge was public and the voluminous papers and legal presentation show that all the evidence in the case was the common possession of both parties to the controversy. The report submitted by Maj. C. S. Riche, Corps of Engineers, was not a decision, but simply his opinion, and all the facts upon which his opinion was based were before the War Department. The matter was given full consideration irrespective of such report.

3. I know of no reason why he should have been expected to furnish a copy of such report direct; but, however, there can be no objection to its being furnished to the representatives of the Bridge Company, and a press copy is herewith, and if the same meets with the approval of the Secretary of War it is suggested that such copy be sent to Mr. Swayne, with authority to have such copies made as he may desire.

4. Assuming that the Secretary of War intends to give a personal hearing in this matter, I make the suggestion that the complainants against the Bridge be offered an opportunity to present their side of the case.

5. The matter has been before the district engineer's office for many years and in connection with

latest complaints was under consideration for nearly a year; and the public hearing required by law and the orders of the Department has already been held by the district officer.

6. The complaint upon which the present action was taken was filed by Capt. John Kileen, Superintendent, Diamond Jo Line Steamers, whose address is Dubuque, Iowa. He is doubtless informed as to others interested in the matter who would wish to be represented at any further hearing.

7. If authorized to do so, I could also cause public notice of the intended action to be given through the engineer office at Rock Island, Ill."

for the reason that the same was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations charged in the information.

IX.

The court erred in admitting in evidence the certified copy of the letter of April 21, 1906, addressed to Mr. N. H. Swayne, Toledo, Ohio, and signed "Robert Shaw Oliver, Assistant Secretary of War" in the words and figures following:

"SIR: Referring to your letter of 26th ultimo, in which you request a personal hearing before final action is taken in the matter of the Hannibal Bridge across the Mississippi River at Hannibal, Mo., I beg to inform you that Secretary Taft has authorized the Judge-Advocate General of the Army to afford a personal hearing to interested parties, after duly advising them of the date thereof.

"In further compliance with your request, a copy of the report of Major Riche is transmitted herewith, and you are hereby authorized to make as many copies thereof as may be necessary."

for the reasons that the same was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations contained in the information.

X.

The court erred in admitting in evidence the certified copy of the memorandum bearing date of April 9, 1906, signed "Fred W. Carpenter, Private Secretary," in the words and figures following:

"War Department
Office of the Secretary

Memorandum for the Judge-Advocate General.

Correspondence in case of Hannibal Bridge.

The Secretary of War wishes to give the parties a rehearing in the Hannibal Bridge matter. He is so pressed with other matters that he is not able to attend to it personally and desires you to hear them. Will you please fix the date and notify the parties?"

for the reason that the same was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations contained in the information.

XI.

The court erred in admitting in evidence the certified copy of the report signed "Geo. B. Davis, Judge-Advocate General," addressed to the Secretary of War under date of May 15, 1906, wherein report is made at length upon the hearing had and the writer among other things said: "While there is considerable doubt as to whether the bridge, as constructed, is 'an unreasonable obstruction to the free navigation of such waters' for

any of the reasons stated, I think it is established in evidence that 'there is difficulty in passing the draw opening or the *draw span* of such bridge by rafts, steamboats or other water crafts,' and that *for that reason* the order directing alterations was properly issued," and concluded that the case presented came within the operation of section 18 of the Act of March 3, 1899, and that the action theretofore taken by the department should be adhered to, for the reason that the same was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations contained in the information.

XII.

The court erred in admitting in evidence the certified copy of the endorsement on the report of the Judge-Advocate General of May 15, 1906, in the words and figures following:

"Approved:

Let the Chief of Engineers act accordingly.

WM. H. TAFT,
Secy. of War.

July 14, 1906."

for the reason that the same was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations contained in the information.

XIII.

The court erred in admitting in evidence the certified copies of the three letters of July 20, 1906, each signed "Robert Shaw Oliver, Acting Secretary of War" and addressed respectively to George A. Mahan, Attorney

for the Hannibal Bridge Company, Hannibal, Missouri; F. A. Delano, President Wabash Railroad Company, Western Union Building, Chicago, Ill.; and Noah H. Swayne, Attorney at Law, 49 Produce Exchange, Toledo, Ohio, which letters advised that under date of July 14, 1906, the Secretary of War approved the conclusions reached by the Judge-Advocate General of the Army, as a result of the rehearing, to the effect that the previous action of the department ordering certain changes in the Hannibal Bridge across the Mississippi River at Hannibal, Mo., with a view to rendering navigation through or under it easy, free and unobstructed, should stand and that action be taken accordingly, for the reason that each of said letters was written subsequently to the making and issuance of the notice of March 10, 1906, and did not tend to prove any of the allegations contained in the information.

XIV.

The court erred in refusing at the close of the government's case to direct a verdict of Not Guilty in favor of defendants, for the reasons that:

(1) The evidence adduced did not show or tend to show that the Secretary of War had granted to the defendants a hearing or an opportunity to be heard in relation to the complaint against the bridge or the proposed changes therein but on the contrary affirmatively showed that the only hearing held on said matter was by the Assistant Secretary of War;

(2) The evidence adduced did not show or tend to show that the Secretary of War had good reason to believe or had determined that said bridge was an unreasonable obstruction to the free navigation of the river or that he

took any action with reference to said bridge, or that he gave or caused to be given to the defendants, or to either of them, any notice that required the changing or altering of said bridge, or that he exercised his judgment or discretion in respect to the changes or alterations in said bridge or performed or caused to be performed or approved any of the acts in said proceeding or with respect to the proposed alterations in said bridge, but on the contrary affirmatively showed that the only hearing held in said proceeding was held by the Assistant Secretary of War and that all notices and other acts with respect to said proceeding, the notice, and the proposed changes in said bridge were given, performed or caused to be performed, by the Assistant Secretary of War, who exercised his own discretion in said matter, contrary to the rules and regulations of the Department of War prescribing his duties;

(3) The evidence adduced did not show or tend to show that the notice of the Assistant Secretary of War, bearing date March 10, 1906, was served on the defendants or on either of them or that such notice was served on the defendants or on either of them one year next preceding March 15, 1907, the time in which the bridge was to be altered or that the time named was a reasonable time within which to make the alterations;

(4) The evidence adduced did not show or tend to show that the defendants or either of them had committed a misdemeanor or other offense against the law;

(5) The evidence adduced showed that in making the notice of March 10, 1906, set forth in the information, the Assistant Secretary of War acted arbitrarily and contrary to law;

(6) The evidence adduced shows that the notice of March 10, 1906, signed by the Assistant Secretary of War involved a misinterpretation of the law and was made in consequence of an error of law, because the evidence adduced affirmatively showed that the bridge was not an unreasonable obstruction to the free navigation of the river, within the meaning of the statute;

(7) The evidence adduced affirmatively showed that the Secretary of War granted a rehearing in said proceedings in relation to the proposed changes in said bridge, and that said hearing in legal effect annulled the notice signed by the Assistant Secretary of War under date of March 10, 1906, and no notice as required by law was issued by the Secretary of War or by any one else after final action was taken by the Secretary of War in said proceedings on July 14, 1906;

(8) The order of the Secretary of War of July 14, 1906, made upon a rehearing duly granted, approved the notice of March 10, 1906, signed by the Assistant Secretary of War, only in so far as it was based upon a finding that there was difficulty in passing the draw opening or the draw span of the bridge by rafts steamboats or other water craft and declined to approve such notice of March 10, 1906, on the ground that the bridge was an unreasonable obstruction to the free navigation of the river.

By reason of the limitation upon the power reserved to Congress in and by the Act of July 25, 1866, to alter or amend the same the Secretary of War could not lawfully direct or require any changes to be made in said bridge except for the purpose of preventing or removing material obstructions to the navigation of said river by

the construction of said bridge and therefore the notice of March 10, 1906, as approved by the Secretary of War, was an unlawful exercise of power by him and tended to impair the obligation of the contract contained in the Act of July 25, 1866.

XV.

The court erred in refusing to admit in evidence the order of January 17, 1893, signed by Stephen B. Elkins, Secretary of War, as follows:

“War Department,
Office of Secretary, January 17, 1893.

It appearing from the within papers that the Hannibal Bridge was constructed in the manner required by the Act of Congress authorizing the same, that there have been no serious accidents to boats at this bridge during the past ten or twelve years, that there has been no general demand by the river interests for any change in the bridge, but that there is a difference of opinion among those largely interested in the navigation of the river as to the necessity or utility of the proposed changes; that complaints made of the bridge have been based upon *ex parte* statements, and that the proposed reconstruction of the bridge would involve great expense to those owning or operating the same, without positive assurance of permanent advantage to river interests, no order will be made requiring the reconstruction or improvement of such bridge, the same not being an unreasonable obstruction to free navigation of the river,”

for the reason that said order was competent evidence to show that the bridge was constructed in accordance with the Act of July 25, 1866, and tended to show that the notice of March 10, 1906, was an unreasonable, arbitrary

and unlawful exercise of power, and for the further reason that an Assistant Secretary of War cannot set aside an order made by the Secretary of War.

XVI.

The court erred in refusing to admit in evidence the certified copy of the letter dated at Rock Island, May 5, 1892, signed "A. Mackenzie, Major Corps of Engineers," and addressed to Brig. Gen. Thomas L. Casey, Chief of Engineers, U. S. Army, wherein the writer reported at length the proceedings had in 1892 upon complaint made against the Hannibal Bridge across the Mississippi River at Hannibal, Mo., which culminated in the making of the order of January 17th, 1893, by Hon. Stephen B. Elkins, Secretary of War, that the bridge was not an "unreasonable obstruction to the free navigation" of the river and that reconstruction or improvement of the same would not be ordered, for the reason that said letter was competent evidence to show that the bridge was built as required by the Act of July 25, 1866, and tended to show that the order of March 10, 1906, was an unreasonable, arbitrary and unlawful exercise of power.

XIX.

The court erred in refusing to admit the testimony of the witness Andrew O. Cunningham as to the depth of water under the bridge between the west rest pier of the draw span thereof and the Missouri shore, for the reason that the same tended to show that there is no navigable channel between said piers for boats drawing six feet of water, and that a compliance with said notice would require the defendants to dredge and deepen and make a new or artificial navigable channel of the river between said piers.

XX.

The court erred in excluding Defendants' Exhibits 5, 6 and 7, respectively, which were blue prints showing among other things the depth of water at various points under the line of the Hannibal Bridge, the contour of the river bed, and the soundings made by the government engineers, for the reason that said exhibits and each of them tended to show that a compliance with the notice of March 10, 1906, would require the defendants to dredge and deepen and make a new or artificial navigable channel of the river between said piers.

XXI.

The court erred in its charge to the jury in assuming that the notice of March 10, 1906, was given by the Secretary of War, and that said notice described the changes that were required to be made, and in instructing the jury that the Assistant Secretary of War had a right to make the order directing the change, and that the court could not supervise the propriety of any changes ordered by him, which matters were charged in the following words:

“Evidence has been introduced in this case showing that * * * the Secretary of War directed that these changes be made in this bridge.

“It is not for me, nor for you, gentlemen of the jury, to discuss or try or determine the question of whether the changes directed to be made in this bridge were improper or not. The Secretary of War is by this Act of Congress clothed with the authority to say whether this is an impediment to the navigation of the river or not. If you find from the evidence he has said so, by an order he has issued in this matter, and that was served upon these defendants, and they have not complied with it, and that they were in the management and control of that bridge, and failed to comply with the order made

by the Secretary of War within the time that he limited them to be made, then these defendants who had charge and control of that bridge were guilty of a violation of this statute.

"If you find from the evidence in the case that the Hannibal Bridge Company and the Wabash Railroad Company * * * had notice of the hearing originally had at Rock Island, Ill., and that the Secretary of War thereafter, acting upon the hearing thus had and the evidence thus presented, made an order to change the bridge, then I direct you that the failure to comply with that direction of the Secretary of War was a violation of this statute."

XXII.

The court erred in denying defendants' motion for a new trial on the grounds therein specified.

XXIII.

The court erred in denying defendants' motion in arrest of judgment on the grounds therein specified.

XXIV.

The court erred in entering judgment in favor of the plaintiff and against the defendants.

Argument.

The Hannibal Bridge was built across the Mississippi River in 1871 as a combined railroad and highway bridge (pages 83, 268, 270) under authority of an Act of Congress approved July 25, 1866. The statute will be found at pages 70-73 of the record,* and provided (§2) that the draw should be constructed over the main channel of

*On page 71 of the record, third line of §3 of the Act, the word "lawful" has through clerical error been omitted from the print, next preceding the word "structure" at the end of that line.

the river, at an accessible and navigable point, with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw; that the spans next adjoining the draw should be not less than two hundred and fifty feet in length; and that the piers of the bridge should be parallel with the current of the river.

Section 3 of the act (page 71) provided that the bridge, if constructed according to the limitations of the statute should be a lawful structure and should be recognized and known as a post route, and that the charge which the Bridge Company might make for transmission over the bridge of the United States mails and of the United States troops and munitions of war, should be not greater than the rate per mile paid for similar transportation over the railroads or public highways leading to the bridge. In other words, the Bridge Company, no matter what toll it might charge for foot passengers and wagons across the bridge, was to transport marching troops thereover at the same price that the troops were charged for the privilege of marching along country roads,—which is nothing; for transporting troops on cars, the Bridge Company was restricted in its charge to the lowest mileage rate for ordinary railroad transportation for passengers that either of the adjoining States of Missouri or Illinois might from time to time impose upon railroads within their respective territorial limits; and for the transportation of provisions and munitions of war the Bridge Company was similarly restricted to the lowest charge that either of the states might prescribe for the ordinary transportation of provisions or munitions of war over the railroads of the State. These provisions constituted a term of the *contract* between the

United States and the Bridge Company under which the bridge was built.

The "reserved-power clause" of the act (Sec. 13), it will be noted, is not as broad as the clause which Congress in later years inserted in its grants. No right of repeal is reserved, and the right to alter or amend is so limited that it may be exercised only "to prevent or remove all material obstructions to the navigation of said river by the construction" of the bridge (page 73).

Pursuant to such act the Hannibal bridge was built and was completed in 1871; and for the thirty-nine years and upwards which have intervened since its completion the bridge has been in continuous operation as contemplated.

Under date of January 1, 1883, the Bridge Company leased its structure for a term of ninety-nine years to the Wabash, St. Louis & Pacific Railway Company and to the Missouri Pacific Railway Company, as joint lessees, by an indenture of lease which is in evidence at pages 57-60 of the record, as "United States Exhibit No. 1." One of the plaintiffs in error in the proceeding now before the court, the Wabash Railroad Company, subsequently succeeded, as lessee, to the rights and duties under that lease of the old Wabash, St. Louis and Pacific Railway Company (page 65), and on December 31, 1897, it took from its joint lessee,—the Missouri Pacific Railway Company,—an assignment of all that company's interest in the lease, and assumed and agreed to fulfill all its obligations thereunder. The assignment is in evidence at pages 64-65 of the record as "United States Exhibit No. 2."

The Missouri Pacific Railway Company was made a party defendant below; but on the evidence thus adduced

a verdict of "Not Guilty" was directed in its favor (page 292), and the writ of error now before the court was sued out by the other two defendants, the Hannibal Bridge Company and the Wabash Railroad Company, against whom verdicts of guilty were found (page 292), and upon each of whom several fines of \$2,500. each, on each of the two counts of the information,—aggregating \$10,000. in all,—were imposed by the court (pages 22-23).

The information *charges* (pages 2-3) that ever since its construction the bridge has been "an illegal and unlawful structure and an illegal and unlawful obstruction to navigation upon said river at said place in this, to wit: that the spans of said bridge have been during all said times less than one hundred and sixty feet in the clear on each side of the central or pivot pier of the draw of said bridge." *No evidence, however, was offered in support of such allegation*, and the proceedings conducted by the War Department, as shown by the Government's proof, were not instituted nor did they proceed upon the theory or charge that the bridge was an unlawful structure. The proof, on the contrary, consistently declares that the action of the Assistant Secretary of War proceeded upon his findings (1) that the bridge was an "unreasonable obstruction" to the free navigation of the river because (a) of the unsuitable location of the draw spans and protection cribs; (b) of the lack of suitable guard fences or sheer booms; and (c) of the presence of obstructing riprap around the piers of the bridge,—riprap, by the way, is not a part of the *structure* of the bridge; and (2) that there was "difficulty in passing the draw spans" by rafts, steamboats or other water-craft (page 3).

These were the only objections to the bridge that were

submitted to the War Department when action by it was first requested (pages 80-81); they were the only objections found by the local engineer, Major Lusk, in the preliminary report (pages 83-85, and particularly para. 7); they were the only objections specified by the Chief of Engineers, General Mackenzie, when ordering the hearing (page 86); the only ones specified in the notices of the hearing (pages 87-95); the only ones specified in the recommendation of the Chief of Engineers made after the hearing and upon which alone, by virtue of the statute, the order of March 10, 1906, must rest (pages 114-116); and the only ones specified in the final order or notice of March 10, 1906, (pages 3, 128). It is true that in the report made by Capt. Durham, one of the assistant engineers at Rock Island, to his superior, Major Riche, of the proceedings had upon the public hearing held in 1905 (pages 97-110), it is stated that from a map submitted by one T. M. Straine "Civil Engineer in charge of the Hannibal Bridge" (page 102),—Mr. Straine was *not* a civil engineer, as a matter of fact (see page 280),—it would appear that the bridge was not a legal structure as regards clear width of draw span, and that two unsworn letters or statements (pages 235-238) of a Mr. Meigs, U. S. C. E., (page 240) tended to show that the draw spans were each about two and a half feet short of the required 160 feet (page 102). On these premises, Capt. Durham expressed it as *his* conclusion that the bridge was an illegal structure (page 108); and Major Riche in his report to the Chief of Engineers adopted his subordinate's conclusion to that effect (pages 110-113). But the Chief of Engineers when making his recommendations upon which the notice of March 10, 1906, was issued, had before him the entire evidence taken upon the hearing at Rock Island (pages 149-245),

as well as the reports of his subordinates, and evidently did not accept the testimony as to an alleged shortage of the spans which Capt. Dunham and Major Riche had emphasized, and did *not* find or believe that the bridge was an unlawful structure; for he adopts in his report only those conclusions of Major Riche which are stated in the 8th paragraph of the Chief's recommendation, namely, "that the bridge is an unreasonable obstruction to navigation *by reason of the difficulty and danger of passing through the draw openings*" (pages 115-116).

It was shown in the Government's case that in 1892, when General Mackenzie was Major in charge of the district, he had "exhaustively investigated" the matter of this bridge (page 238), and we attempted below to show that he had then made due report *of his own knowledge* to the then Chief of Engineers,—which report constituted a part of the files of the War Department,—that the bridge had been built in precise accordance with the act of July 25, 1866, that the difficulties complained of were partially, at least, due to the requirements of that law, and that the construction of the Sny Carte L^evee on the East bank of the river was responsible for much of the trouble (page 265); but the court excluded the evidence (pages 257, 261).

The legal presumption, we respectfully submit, must always be in favor of legality until the contrary is proved; and in the absence of a finding or declaration by the Secretary of War, upon an issue fairly presented by and involved upon the hearing, that the bridge is an unlawful structure, and in the entire absence of evidence to support a naked allegation in the information that it is an unlawful structure, the question of unlawfulness is eliminated from the case, and the Hannibal Bridge must

be assumed to be what its owners are ready when called upon to prove that it is, a lawful structure built in exact accordance with the requirements of the act permitting its construction.

Our argument on this writ will be considered under the following points:

1.

The order directing the alteration of the bridge cannot be sustained as a lawful order, without violating the contractual rights secured to the Bridge Company by the Act of July 25, 1866.

2.

If the Act of March 3, 1899, is construed to be in legal effect an amendment of the Act of July 25, 1866, then the Bridge Company was entitled, before deprived of its property or criminally condemned, to a determination in a court of justice of the *fact* that its bridge was a material obstruction to the navigation of the river. Its right of defence in this regard was denied it below, and it has never had its day in court upon that question, notwithstanding that upon a judicial determination of that question must necessarily rest the contractual right of Congress to compel the alterations.

3.

The order of March 10, 1906, was in any event a nullity. The Act of 1899 calls for an exercise of discretion by the Secretary of War himself, one of the executive heads of the Government, and does not contemplate the discretion of an *Assistant* Secretary or other subordinate, or the right of delegation of the discretion reposed in the Secretary.

4.

The so-called re-hearing and the written approval of the Secretary of War of July 14, 1906, did not validate the order of March 10, 1906, nor did they tend to prove any of the allegations contained in the Information. The admission of the same in evidence, over defendants' objection, was error.

5.

The order of March 10, 1906, assuming its validity in other respects, was fatally defective in that it did not specify with such particularity as to enable the defendants to comply with the order, the changes in the bridge that were required to be made.

6.

Even if the changes ordered to be made may be held to have been specified in the order of March 10, 1906, with the particularity required by the statute, they nevertheless were impossible of performance unless defendants below should consent to excavate through the rock, at their own expense, a new channel for the river; and this they were unwilling to do. The order was consequently an unlawful order, and the court below erred in excluding the evidence, offered by defendants, which tended to show that a compliance with the order necessarily involved the excavation by defendants of a new channel through the rock.

7.

Assuming that the order of March 10, 1906, was a lawful order, there still was an entire failure of proof of the service of same upon defendants below, as is specifically required by the statute.

8.

The court below erred in its charge to the jury as set forth in the Twenty-first Assignment of Error.

9.

The court has ample jurisdiction to determine whether an act of an official of an executive department is authorized by the statute under which he assumed to act.

POINT I.

The order directing the alteration of the bridge cannot be sustained as a lawful order, without violating the contractual rights secured to the Bridge Company by the Act of July 25, 1866.

The Act of 1866 was passed by Congress at the close of the war, during which the Government had experienced a great deal of difficulty in getting troops and munitions of war across the Mississippi River. It was the well defined purpose of Congress at that time to induce the construction of bridges that would afford ready transportation in the future between the East and the West, and the act specifically authorized the construction of bridges, pursuant to its terms, at seven different points along the Mississippi and at one point, Kansas City, on the Missouri River. One of the considerations to the Government, and a very substantial one, was the reservation of the right to transport troops and munitions of war over all such bridges at either no cost at all or at a cost much below what the Government would otherwise be compelled to pay.

We do not have to argue in this Court that the Act of 1866 constituted a *contract* between the Government

and each company which might accept the franchise by building a bridge pursuant to its terms; and we concede that one of the terms of that contract was a reserved right in Congress to alter or amend the act, "so as to "prevent or remove all material obstructions to the navigation of said river by the construction of bridges" (page 73). Congress *could* have made this reserved power broader, had it intended to do so. It could have reserved the right to alter or amend in *any* particular, and without limitation. It could also have reserved the right to repeal the act. But it did none of these things, and the franchise was accepted by each of the companies, which built under the act, upon the stipulated term that Congress surrendered its right throughout the future to compel an alteration of any bridge so built *except* for the purpose of preventing or removing each material obstruction to navigation which the building of such bridge might cause. The right that was reserved was the right to alter or amend, but with a stipulated limitation upon the scope of such right.

Two questions are therefore presented for consideration: (1) Was the Act of 1899,—under which the order of March 10, 1906, was made,—in legal effect an amendment by Congress of the Act of 1866; and (2) if it were such amendment, could Congress deny to the Bridge Company the right to litigate the question whether the amendment, which Congress thus sought to make, was within the contractual limitation upon the right to amend as reserved by the Act of 1866. The second of these questions will be considered in the next succeeding point of our argument.

If the Act of 1899 were *not*, in legal effect, an amend-

ment of the Act of 1866, then the proceedings had by the Assistant Secretary of War were clearly a usurpation of authority by him, and the order of March 10, 1906, was clearly an unlawful order.

We are not disputing the principle enunciated by this Court in

Union Bridge Co. v. United States, (204 U. S., 364, 386)

where Mr. Justice HARLAN, in construing the Act of 1899, said:

“By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only exercise the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power.”

It is true that the Act of 1899 referred by its terms to *all* railroad and other bridges, whether “now constructed or which may hereafter be constructed” (page 40); but that is not necessarily conclusive of an intent by Congress to include, as within the operation of that statute, bridges built under the Act of 1866. It is not to be presumed, in construing an act, that Congress intended by its enactment to do that which it had no legal right to do. If, to accomplish a purpose which it greatly desired when the statute of 1866 was enacted, it somewhat tied its

hands as to compelling alterations of bridges built under that statute, a subsequent enactment which proceeded upon the theory of its unfettered right to compel alterations may not properly be construed, as it seems to us, as an intended amendment of the earlier statute.

By the Act of 1899, as construed in the *Union Bridge Company* case, Congress has directed alterations to be made where *either* of two conditions may be found by the Secretary of War to exist: (1) Where the bridge is "*an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise;*" and (2),—a wholly distinct situation, contrasted in the statute by the word "*or*" as *not* constituting an unreasonable obstruction,—"*where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats or other water craft*" (pages 40-41).

So far as the latter provision of the Act of 1899 is concerned, it clearly may not be held to evidence an intent by Congress to amend the Act of 1866; for even if such provision had been comprised in a separate statute, declaring on its face that it was an amendment of the Act of 1866, it would have accomplished nothing, and for the reason that Congress *could* not amend the earlier act so as to compel alterations of the bridge merely because of a difficulty that might exist in the passing of the draw span. Any *such* difficulty, Congress declared by the Act of 1899, was different from an unreasonable obstruction and therefore was *not* an unreasonable obstruction within the meaning of those words as used by Congress; and yet by the limitation contained in the Act of 1866 upon its power to compel alterations Congress could order them only when they constituted a material obstruction or,

what amounts to the same thing, an "unreasonable" obstruction to navigation.

It seems to us, therefore, that it would be a strained application of the rules of statutory construction to hold that the broad provisions of the Act of 1899 were intended by Congress as an "alteration" (page 73) or amendment of the Act of 1866.

The situation as it existed at the time the statute of 1899 was enacted, also lends force, as it seems to us, to our argument that Congress did not intend by the Act of 1899 to legislate as to bridges constructed under the Act of 1866. The situation as to the Hannibal Bridge was shown in two of the exhibits offered in evidence by defendants, and excluded by the court. The first, *Defendant's Exhibit 3*, is a certified copy of a report made by Brig. Gen. W. K. Warren to Congress in 1876, relative to the Hannibal Bridge, among others, and the physical conditions which surrounded that bridge (pages 267-269); and the other, *Defendant's Exhibit 2*, is a certified copy of a report made by Major Mackenzie to the Chief of Engineers in 1892, also relating in part to those physical conditions (pages 257, 262-266).

Gen Warren, in describing the situation as he found it in 1876, said (pages 268-269):

"This bridge crosses the river at a point about one mile above the steamboat landing of Hannibal, Mo., about 17 miles below Quincy. The river at this point is nearly all in one channel, and is very narrow and deep. About one-half mile above (where the river first strikes the bluff on the right bank) the river bends sharply through an angle exceeding 90°; the width is only about one-fourth mile, being one of the narrowest points on the river. It was a noted crossing place for the Indians in their day.

“The low-water width of the river at the point where the bridge is located is about 1,500 feet. *Prior to the building of the Sny Carte Levee, the high water spread out from bluff to bluff, six and one-half miles; but the levee narrowed the high water width at this point to about twenty-three hundred feet.* * * * The effect of this was to confine all the flood waters to the main channel, causing their greater volume and velocity. * * * The rise from low to high water is about twenty-two feet.”

Major Mackenzie in his report to the Chief of Engineers in 1892, said with regard to the effect of the construction upon the bridge of the Sny Carte Levee, which though giving way in part in 1876, was subsequently restored (pages 263-266):

“The obstruction to navigation caused by the Hannibal Bridge results from the facts: that the bridge was built at a comparatively narrow portion of the river; that the embankment of approach *and the Sny Carte Levee so confine the full discharge of the river as to make the current at high stages very swift*” etc. (page 263). * * *

“The claims that the bridge was built in accordance with the law of July 25, 1866, that the present difficulties are partially at least due to the requirements of the law, *and that the Sny Carte Levee is responsible for much of the trouble,* are undoubtedly correct (page 265). * * *

“If it should be deemed proper to present this matter to Congress for its consideration, a question would arise as to whether such work should be required at the sole expense,—(probably not less than \$150,000),—of the Wabash Railroad Company, or, in consideration of the fact that *the present trouble is, partially at least, due to the original law and the construction of the Sny Carte Levee,* the United States should in consideration of the Wabash Com-

pany carrying out the desired work refund to them such a proportion of the expense as might, by a proper tribunal, be deemed to be equitable and just" (page 266).

With these official reports on file, one made directly to Congress and the other to the Chief of Engineers in the Department of War, is it not a proper inference, particularly in view of the broad scope of the new legislation, that the language employed by Congress in the Act of 1899 was *not* intended by it to alter or amend the Act of 1866? Is it not inferable from the physical situation,—with which Congress must be presumed to have been familiar when it enacted the statute of 1899—that there may have been a realization on its part of the injustice of compelling the Bridge Company to make costly alteration of its structure in order to meet unfavorable conditions caused in very large part by the Sny Carte Levee, which was built subsequently to the construction of the bridge and for the purpose of reclaiming over *six miles in width* of Illinois territory from the devastating inundations of each recurring stage of high water? In the uncertainty of the application of the Act of 1899 to the Act of 1866, may we not assume that when Congress passed the later act it had not forgotten its enactment of 1866 and the limitations there contained upon its power to alter bridges built under that act? And if it had in mind, as it must be presumed to have had, the existence and terms of the Act of 1866, may we properly say that the language it employed in 1899 clearly evidenced an intent to alter or amend the earlier statute?

The rule, as we apprehend it, is that in construing a statute the court may not look beyond the words of the enactment to ascertain the legislative intent except that

it *may* consider the situation as it existed at the time of the enactment in order to arrive at a proper understanding of the evil which it was designed to correct. And under that rule, we respectfully submit, not only from the words employed but also from the situation as it existed at the time of the new legislation, the Act of 1899 may not be construed to be an amendment or alteration of the Act of 1866.

POINT II.

If the Act of March 3, 1899, is construed to be, in legal effect, an amendment or alteration of the Act of July 25, 1866, the Bridge Company was entitled, before deprived of its property or criminally condemned, to a determination in a Court of Justice of the *fact* that its bridge was a material obstruction to the navigation of the river. Its right of defence in this regard was denied it below and it has never had its day in court upon that question, notwithstanding that upon a judicial determination of that question must rest the contractual right of Congress to compel the alterations.

Assuming, for the sake of argument, and without conceding the soundness of the assumption, that the effect of the Act of 1899 was an amendment or alteration of the Act of 1866 and that Congress intended to include within the provisions of the Act of 1899, and subject to its terms, bridges built under the Act of 1866 as well as all other bridges over navigable waterways, the question is then presented was it competent for Congress to deny to the Bridge Companies with whom it had so clearly and precisely contracted, the right to litigate in a court of law the fundamental question whether alterations ordered

by the Secretary of War did or did not fall within the limitation of the powers reserved to Congress in the Act of 1866.

If the later act be held applicable to bridges built under the Act of 1866, *all* its terms must be held to be so applicable; and those terms conclude the owners of such a bridge, when once an order compelling alterations has been made by the Secretary of War, from submitting to a court of justice, for *its* determination, the fundamental question of fact upon which the contractual right of the Government to compel alterations must rest, namely, whether or not the bridge *is* a material obstruction to navigation. We concede that as to bridges built under governmental authority other than the Act of 1866,—whether it be a federal statute wherein Congress has not restricted its right to compel alterations, or the statute of some sovereign state,—a determination by the Secretary of War that the bridge as constructed is a material obstruction, is in legal effect a determination to that effect by Congress; and as Congress in such cases is not fettered in its action by any contractual limitation upon the free exercise of its constitutional power to regulate commerce and navigation, the owners of such a bridge may not submit to a court for *its* determination the question as to whether what Congress has declared to be an obstruction is or is not one in point of fact. Congress has theoretically (in the Act of 1899) safeguarded the rights of the owners of such a bridge by providing for a hearing, under the direction of the Secretary of War, before the order is made; and when once, upon the evidence adduced at such hearing, the Secretary of War has made an order directing alterations, the function of the court is properly limited to a determination of the simple question whether there was *any* proof before the Secretary

sufficient to support his finding. If there were, so that his action in directing the alterations is seen to be something more than a mere arbitrary fiat, neither the court nor the jury may weigh the proof upon which the Secretary's order was made and substitute possibly a different conclusion therefrom for the conclusion that was drawn by the Secretary.

But where the element of contractual limitation intervenes upon the right to compel alterations, the situation is at once differentiated. Congress, a party to the contract, may not conclude the other party by an arbitrary assertion that a fact does or does not exist upon which contractual rights depend. To indulge in an exaggerated hypothesis, suppose that under the Act of 1899 the Secretary of War (or even Congress, by a special act) had ordered the Bridge Company to paint its structure green. Can it be doubted that the Bridge Company would have the right, in defence of proceedings against it under the Act of 1899, to litigate the question whether such alteration of the bridge tended to prevent or remove any material obstruction to the navigation of the river? What efficacy can there be in a contract if a party thereto may be precluded by the mere fiat of the other and stronger party from even litigating any question of right which may arise thereunder? In a case so clear as that which we have assumed in our hypothesis, the right could not, of course, be denied to the Bridge Company to submit to the court, in its defense, the question whether Congress had precluded itself by its contract from ordering the particular change required; and yet the principle is the same on the facts now before this court.

If, therefore, the Act of 1899 is in legal effect an amendment of the Act of 1866, it was competent for the Bridge

Company to submit to the court, in defense of these proceedings, the question of fact as to whether the order made by Congress (through the Secretary of War) would or would not remove a material obstruction to the navigation of the river,—in other words, whether the bridge as it then existed was or was not a material obstruction. *That* was a question of fact upon which the validity of the order of Congress must rest according to which way the question might be determined by the jury; and we respectfully submit that the learned court below erred in excluding all evidence offered by plaintiffs in error tending to show that the bridge, as at present constructed, does *not* constitute a material obstruction to the navigation of the river.

It is not an answer to such argument to say that the Bridge Company had its day before the engineers of the War Department at Rock Island or even before the Assistant Secretary of War. To hold that Congress itself possessed, or could confer upon the Secretary of War, a right of decision as to whether changes ordered were or were not a violation of the Bridge Company's contractual rights, is to accord to Congress or to the Secretary of War, as the case may be, judicial powers; and we do not need to argue the error of such a ruling.

We are not unmindful, in what we have thus far said, of the opinion of this court in

Bridge Co. vs. United States (105 U. S. 470).

The prevailing opinion in that case was written by Chief Justice WAITE and was concurred in by Justices WOODS, GRAY and HARLAN, while three strong dissenting opinions were written by Justices MILLER, FIELD and BRADLEY, respectively. Justice MATTHEWS took no part

in the case, and Justice BLATCHFORD was not a member of the court at the time the decision was rendered.

It appeared in that case that the Newport and Cincinnati Bridge Company, a creature of the legislatures of the States of Ohio and Kentucky, had been incorporated for the purpose of building a bridge across the Ohio river. The state charters required that the bridge should be constructed in accordance with the provisions of an Act of Congress of July 14, 1862, "or any act that Congress might pass on the subject"; and on March 3, 1869, prior to the commencement of construction, Congress passed a resolution giving its assent. Such resolution, however, contained this reservation:

"But Congress reserves the right to withdraw the assent hereby given, in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge".

The company commenced the erection of its bridge in accordance with the requirements of the Act of 1862, and expended a large amount of money in the undertaking; but before the bridge was finished, Congress passed another act (March 3, 1871) requiring a much greater height for the bridge than was specified in the Act of 1862, and providing that upon the Bridge Company making the changes so required it might file its bill in the Circuit Court of the United States. Jurisdiction was conferred upon the court to determine in any such suit, first, whether the bridge had been constructed, so far as the work had then progressed, in accordance with the provisions of law then in existence, and, secondly, the lia-

bility of the United States, "if any there be," to said company by reason of the changes required, and, in case liability on its part was found, to ascertain and determine the amount of the increased cost. The company yielded to these new requirements, completed the bridge on the altered plan, and then filed its bill against the United States in accordance with the statute. The court below found, after a hearing, that the bridge had been constructed in all things according to the requirements of law, but dismissed the bill; and it was on appeal from such decree that the opinions referred to were written in this court.

The precise question that was before the court for decision, is not wholly clear. Justice MILLER pointed out in his dissenting opinion (pages 485-486) not only that there was no declaration (and therefore no legislative finding) in the Act of 1871 that the bridge as then constructed or in process of construction was in any particular an obstruction to navigation but, further than that, that the court below had not based its decree upon the theory that the bridge was or would become an obstruction, and that the argument of counsel had not proceeded upon a contention that any such fact was a necessary condition to an exercise by Congress of the power which it had assumed in passing the statute requiring alterations. The decision seems to have turned rather upon the question as to whether Congress intended, by the use of the words "if any [liability] there be", in the Act of 1871, to ask a judicial determination of the abstract power of Congress to require alterations without making compensation therefor. And it was upon that question that the court so sharply and so strenuously divided. Although in the course of the prevailing opinion the Chief Justice

touched lightly (page 480) upon the question as to whether, under the reserved-power clause of the Resolution of 1869, the assent of Congress could be withdrawn unless it were in some way judicially ascertained that the bridge, as authorized, either did or would substantially and materially obstruct free navigation,—remarking, in this connection, “Such, we think, is not the fair meaning of the language employed,”—the question as to whether Congress was bound by reason of the contractual element of the franchise, does not seem to have been accorded much consideration by the majority of the court or to have entered into the reasoning upon which it based its affirmance of the dismissal below. That such question, however, was given some consideration must be conceded not only from the fact that the prevailing opinion touches lightly upon it but also from the fact that Justice FIELD in his dissenting opinion, vigorously and with a logic that seems to us must carry conviction, states the rule to be as we contend. He says (page 503):

“The resolution of Congress giving its consent to the erection of the bridge specified its character and form; and the right to withdraw the consent, or to direct necessary modifications and alterations of the bridge, was reserved to be exercised *only* in case the free navigation of the river should at any time be substantially and materially obstructed by the bridge. The reservation clause is to be read as though written thus: ‘But Congress reserves the right to withdraw the assent hereby given (or to direct the necessary modifications and alterations of said bridge) in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under authority of this resolution’. The right to withdraw the assent or to direct alterations was thus

made to depend upon the same contingency; *and the resolution amounts to a pledge of the government that neither should be done unless the contingency happened.* * * *

"The general government, through Congress, thus bound itself not to interfere with the construction of the bridge, nor with the bridge when completed, except on the contingency of its proving a material obstruction to the free navigation of the river. Such contingency had not occurred when the Act directing the alterations was passed; it has never occurred. So the proofs in the case show. And, independently of this circumstance, whether or not the contingency had occurred, was not a fact to be arbitrarily determined by the legislature. *It was to be ascertained judicially, upon proofs and after hearing the parties, like any other disputed fact upon the establishment of which rights of property depend.*"

He then cites in support of such proposition, and discusses, the cases of

Commonwealth vs. New Bedford Bridge Co. (2 Gray 339)

Mayor of Baltimore vs. Connellsville R. R. (4 Am. Law Reg., N. S., 750)

In the prevailing opinion in the *Newport and Cincinnati* bridge case, the Chief Justice reviewed the history of legislation by Congress in the matter of bridges across navigable waterways. He showed (page 476) that from the first enactment, in 1852, through the Act of February 17, 1865, franchises to construct bridges had been granted without any reservation whatsoever of power in Congress for future control. With the Act of July 25, 1866,—under which the Hannibal bridge was built,—a *limited* right of control was reserved; and such limited right, in the same restricted language, was reserved in all subse-

quent acts, whether legalizing or authorizing the construction of bridges, until February 19, 1869, when a resolution assenting to the construction of a bridge across the Connecticut river was adopted, with a new form of reservation,—the same that was embodied in the Resolution of March 3, 1869, above referred to, relating to the Newport and Cincinnati bridge. And then finally came the Act of March 3, 1869, authorizing the construction of the Brooklyn bridge, in which was reserved the power “*at any time to alter, amend or repeal*”, without any limitation whatsoever.

The successive changes in these distinct classes of legislation from (1) a surrender of *all* right of future control, through (2) the reservation, as in the Act of 1866, of a strictly *limited* right, then (3) the reservation, as in the Resolutions of 1869 touching the Connecticut and Ohio river bridges, of a broader but nevertheless still limited right of control, to (4) the reservation, as in the case of the Brooklyn bridge and all succeeding bridges, of a *complete* control, must be possessed of some significance.

We are not contending against the principle that Congress, as the constitutional protector of commerce, is fundamentally supreme in its right of determination as to what does or does not constitute an obstruction to navigation; but we do contend that Congress may surrender such right, either by direct language or by conduct from which an intent so to do is necessarily to be implied, and that such right was *necessarily* surrendered by it when, upon a sufficient consideration, it granted contractual rights to the Bridge Company under the Act of 1866.

If this be not so, wherein lay the contractual element

of the franchise? That Congress intended to limit its right of future control seems clear from the language employed; but wherein lay the limitation, if the clause is to be construed otherwise than as a surrender by Congress, for the purposes of the contract, of its inherent right to determine whether the situation has arisen upon which alone it may require alterations? If the construction is to be that, notwithstanding the clear words of limitation used, there nevertheless has been no surrender, then necessarily there has been no contract. Congress got its consideration for nothing, and is not bound to anything; and the Bridge Company accepted a franchise which secured to it *nothing*, and expended large sums of money upon the faith of words used by Congress of absolutely no meaning or effect. The reserved-power clause must be held to be of precisely the same effect as if the words of limitation had not been used, and Congress must be held to have retained the same unlimited right of control as in the Acts of March 3, 1869, and subsequent years, where language of wider scope was employed. The principle supporting such a construction of the statute, moreover, would necessarily give unlimited control over bridges built under the Acts of 1852 to 1865 where *no* power was reserved; and the use of language in Congressional enactments must be held to be meaningless, so far as the matter of contract rights are concerned.

It seems to us that upon every consideration of justice and fair dealing on the part of the Government, when seeking in 1866 to secure its desired ends, as well as upon accepted rules of statutory construction, the contractual feature of the Act of 1866 may not be spurned or ignored by the Court under the supposed authority

of the Newport and Cincinnati bridge case. But if the court should be of the opinion that such contractual feature *does* fall within the decision of that case, we ask that it will reconsider its decision there made, which, after all, as Justice BREWER points out at page 339 of the subsequent opinion of this Court in

Monongahela Navigation Co. vs. United States,
(148 U. S. 312)

was rendered upon the vote of only *four to three* of the justices of the Court. It was at best a decision of a *minority* of the full Court, and we feel justified in asking a reconsideration of the narrow question which was so forcefully presented in the dissenting opinion of Mr. Justice FIELD (pages 502-506).

Another consideration that is wholly inconsistent, as it seems to us, with the Government's right to succeed upon this writ, is that in any event, even assuming that all we have said before has been said under a misapprehension of the law, the determination by the *Secretary of War* that our bridge is an obstruction to navigation is *not* the determination of the fact by Congress. Assuming for the sake of the argument what we otherwise do not for one moment assume, namely, that Congress did not intend to surrender, as to bridges built under the Act of 1866, the right of determination of the *fact* upon which the contract rights of the bridge companies necessarily depend, we are then clearly entitled to a determination by Congress itself of the fact that our bridge is an obstruction, before we may be required at our own expense to alter it. The case of

Union Bridge Co. vs. United States (204 U. S.
364)

is not opposed to this contention. The principle there enunciated by Mr. Justice HARLAN, as above quoted, was that in the statute of 1899 Congress had, by general enactment, declared that all bridges which *are* in fact obstructions to navigation shall be altered in such wise as the Secretary of War may direct; that the function of the Secretary under the Act was simply to ascertain whether this bridge or that came within the class that was condemned; and that his ascertainment and **declaration** of the fact was not the exercise by him of a legislative function.

But Chief Justice WAITE said in the prevailing opinion, already referred to, of

Bridge Co. vs. United States (105 U. S., 470)

at pages 480-481:

“It was, originally, a proper subject of *legislative* inquiry whether the joint resolution [of 1869] made sufficient provision for the protection of commerce. There is nothing to indicate that any different inquiry was to be instituted to determine whether the assent that had been given should be withdrawn; and as the withdrawal involved an act *legislative in its character*, the necessary presumption is that the inquiry on which it was to be predicated would be *legislative* also The withdrawal of assent, therefore, has been left to depend on the judgment of *Congress* in the exercise of its *legislative discretion*. For this purpose *Congress* must make its own inquiries, and determine for itself whether the obstruction that has been authorized is so material and so substantial as to justify, under all the circumstances of the case, an exercise of the power which was reserved as a condition of the original grant made.”

If this be a sound exposition of the law, can it be said,

—in view of the contractual element which was not present in the *Union Bridge Company* case but is present in the case now before the court,—that the determination by the Secretary of War of the *fact* that the bridge is an obstruction to navigation, is not the exercise of a *legislative discretion*, which Congress had agreed, by the Act of 1866, should be the test of its right to require alterations? As construed in the *Union Bridge Company* case, the Act of 1899 provides simply that the bridge shall be altered *if* the Secretary of War finds it to be an obstruction; and indeed that act could not well be held to mean anything more without construing it as a delegation, to an executive officer, of legislative functions of government. It nevertheless leaves it to the Secretary of War to ascertain the fact, and for that reason, and that reason only, has been sustained as a constitutional enactment. But is not the ascertainment and declaration of the *fact* precisely what the Chief Justice held, and necessarily held, in the Newport and Cincinnati bridge case, was the exercise of a *legislative discretion*? And is it not just a little over the line of constitutional inhibition for Congress to attempt to vest in the Secretary of War the right to ascertain and determine the *fact* upon which the contractual rights of the bridge company depends? Is not this really, under our contract, a delegation to the Secretary of both legislative and judicial functions? When the bridge company contracted with Congress that the bridge might be altered in case *Congress* should ascertain and determine it to be an obstruction,—and that is the least that can be claimed for the contract under the Newport and Cincinnati bridge case,—and Congress subsequently declared (by the Act of 1899) that if the Secretary of War

should have good reason to "believe" that it was an obstruction then the bridge must be altered,—is there not necessarily a departure here by Congress from one of the fundamental and, to the Bridge Company, all important terms of the contract?

It is not a mere technical right, without substance, for which we contend. If a determination of the fact be, as we contracted it should be, a *legislative* function, then we are entitled to a consideration of the conditions by a deliberative assembly, with the right of debate, and action by that body upon the question of fact on which our rights depend. Congress cannot, as it seems to us, without a distinct violation not only of our contractual rights (assuming the law to be as laid down by the Chief Justice in the Newport and Cincinnati bridge case) but also of its constitutionally imposed obligations, evade its duty in this regard and conclude us by what an executive officer of the government may "believe" and declare to be the fact. If Congress has not, by the Act of 1866, surrendered its right to determine, for the purposes of the contract, the fact upon which alone it may require alterations, then we are entitled to an ascertainment of the fact *by Congress*, and not by an officer of one of the executive departments of the government.

In United States v. Central Pacific R. R. Co.
(118 U. S., 235)

the court said, at page 238:

"These sections, taken together, constitute the contract between the United States and the appellee [citing cases]. This contract is binding on the United States, and it cannot, without consent of the company, change its terms by any subsequent legislation."

In *Walker v. Whitehead* (16 Wall., 314)

the court said, at page 318:

“The obligation of a contract ‘is the law which ‘binds the parties to perform their agreement’. Any impairment of the obligation of a contract,—the degree of impairment is immaterial,—is within the prohibition of the Constitution.”

In *People ex rel v. Otis* (90 N. Y., 48)

the court said, at page 52a:

“Depriving an owner of property of one of its essential attributes, is depriving him of his property within the Constitutional provision.”

In *State v. Julow* (129 Mo., 172)

the court said:

“Every auxiliary right, every attribute, necessary to make the principle right effectual and valuable in its most extensive sense, pass as incidents of the original grant. The rights thus guaranteed are something more than the mere privilege of locomotion; the guarantee is the negation of arbitrary power in every form which results in the deprivation of a right.”

POINT III.

The order of March 10, 1906, was in any event a nullity. The Act of 1899 calls for an exercise of discretion by the Secretary of War himself, one of the executive heads of the Government, and does not contemplate the discretion of an *Assistant Secretary* or other subordinate, or the right of delegation of the discretion reposed in the Secretary.

The evidence introduced by the government tended to show that both the Judge Advocate General in his report of the so-called rehearing (page 147), and the Secretary of War himself, in approving the conclusion of the Judge Advocate General (page 147) regarded the making of the order of March 10, 1906, as *departmental* rather than as individual action. The words used by the Judge Advocate General in stating his conclusions are that "the action heretofore taken *by the Department* should be adhered to" (page 147); and the Secretary of War endorsed his approval upon the report which embodied such conclusion (page 147). The learned trial judge, too, based his admission of the order upon the same conception of the statute. At page 118, when the order was offered and objected to, the learned judge said:—"The opinion of the court is that the official action of *the War Department*, by the Assistant Secretary of War signing this paper, is in point of fact the action of the Secretary of War." And at an earlier stage of the case, when overruling the demurrer, he said (page 42); "Congress never contemplated by this Act that *every* notice" (the italics are ours) "that was required to be sent under this law should be signed personally by the Secretary of War himself. It is sufficient that the *Department*, by its principal or any of its assistants, authorized by

“law, should sign such notice * * * . The Court
 “holds that the notice given by the Assistant Secretary
 “of War is in point of fact, under the law, a notice given
 “by the Secretary of War, under this statute.”

Whatever might be said as to the soundness of this conception upon demurrer, when the allegations of the information were for the purposes of the argument conceded to be true, the ruling was, as it seems to us, distinctly erroneous on the proof as it stood at the time when the question again came before the court,—when the order was offered in evidence. It had then been affirmatively shown by the government that the Secretary of War did not consider the matter at all, did not exercise the discretion reposed in him by the Act of 1899, did not give any notice to alter, did not direct the giving of any such notice, did not approve any findings of any subordinate in his department, did not pass upon the recommendations of the Chief of Engineers,—in short that he was a complete stranger to the proceeding from start to finish. The record shows that the entire matter came consistently before and that, where executive approval in the proceedings was required, such approval was consistently given by the *Assistant Secretary* (pages 113, 129); that the Secretary of War himself did not touch a pen to the record, and did not see or hear of or know anything at all about the proceeding. On such a state of the proof, we think the admission of General Oliver's order of March 10, 1906, was clearly error.

The phraseology of the statute (pages 40-41) is not ambiguous, but is direct. It does not say “When it shall appear to *the War Department* that any railroad or other “bridge” is an unreasonable obstruction etc., “it shall “be the duty of the *War Department* to give notice, etc.

“in which *it* shall specify the changes recommended by “the Chief of Engineers that are required to be made and “shall prescribe a reasonable time within which to make “them.” Or that, “If at the end of such time the alteration has not been made, the *War Department* shall “forthwith notify the United States district attorney,” etc. Or that, “If the persons or corporations owning or “controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, “from the *War Department*, and within the time prescribed by *it*, wilfully fail or refuse to remove the same “or to comply with the lawful order of said *Department*, “such persons or corporations shall be deemed guilty of “a misdemeanor” etc.

Congress might have phrased the statute in that way and doubtless would have done so had departmental action been within its contemplation; but the language employed expresses, as it clearly seems to us, an entirely different intent. It is distinctly and consistently personal in its application, throughout the statute, to the Secretary of War himself. “Whenever the *Secretary of War*,” it says, “shall have good reason to believe” etc. Does not this of itself preclude the construction that departmental action was contemplated? The “*belief*” of the Secretary,—the responsible head of one of the great departments of the government,—is the basis of the proceeding. If *he* does not “believe” that the bridge is an obstruction, then a proceeding under the statute is unauthorized no matter what may be the “belief” of every assistant and subordinate in the department. But if the Secretary of War has “good reason to believe” that a bridge is an unreasonable obstruction, etc., the statute goes on, it shall be the duty, not of the Depart-

ment or of any officer thereof, but "*of the said Secretary,*" first giving the parties reasonable opportunity to be heard, to give notice to alter, etc; "and in giving "such notice *he* shall specify the changes, recommended "by the Chief of Engineers, that are required to be "made, and [*he*] shall prescribe in each case a reasonable time in which to make them. If at the end of "such time the alteration has not been made, *the Secretary of War* shall forthwith notify the United States "district attorney" etc.; and if the persons or corporations owning or controlling the bridge shall, "after receiving notice to that effect, as hereinabove required, "*from the Secretary of War*, and within the time prescribed *by him* willfully fail or refuse to remove the "same, or to comply with the lawful order of *the Secretary of War* in the premises, such persons" etc. shall be deemed guilty of a misdemeanor.

Is it not an unduly free construction of words of perfectly clear import to say that departmental action was here intended?

If our interpretation of the statute be the sound one, namely, that by the Act of 1899 Congress reposed the discretion of determining whether a bridge is or is not an unreasonable obstruction etc., in the responsible head of one of the great executive departments, then, on the familiar maxim *delegatus delegare non potest*, the Secretary could not delegate the exercise of that discretion to another. If it were competent for the Secretary to repose in the Assistant Secretary the discretion which Congress had reposed in him, why could he in turn not repose it in the Chief of Engineers, who, in giving the notice which is contemplated by the statute, would specify the changes recommended by himself? Or even in the district engineer of the locality where the bridge

is situated, who presumably would have a larger and more detailed knowledge of the situation than any of his superiors? Why did Congress specify the Secretary at all if it did not intend that *his* belief and discretion should control the proceeding?

We cannot rid ourselves of the conviction that both by the clear phraseology of the statute and by what would naturally be supposed to be the intent of its framers, the object which Congress sought to accomplish was to repose in the Secretary of War himself, and in nobody else, the exclusive power of finally determining whether a bridge was or was not an unreasonable obstruction to navigation; and some support is found for this view in the fact that when seven years later, by the Act of March 23, 1906 (*34 Stat. L. chap. 1,130, §§4-5*), Congress again took up legislation touching the removal of obstructions to the free navigation of the waterways of the United States, it conferred not only upon the Secretary of War, as in the former act, but upon the Chief of Engineers as well, the power to make "lawful orders" in connection with the removal of such obstructions.

So distinguished an authority as Judge BALDWIN, late of the Supreme Court of Connecticut, expressed the gravest doubt as to the right of the Secretary of War to delegate to the Assistant Secretary power,—similar to that contained in the Act of 1899,—which was vested in the *Secretary* by the Act of July 13, 1892, (*27 Stat. L., 110*). The Act of 1892 considered by Judge BALDWIN provided that "it shall not be lawful (hereafter)
 "to excavate or in any manner to alter
 "the course, location, condition or capacity of any
 "harbor, or of the channel of any navigable
 "water of the United States, unless approved and au-

"thorized by the Secretary of War." The case in which Judge BALDWIN wrote

Lane vs. Smith (71 Conn. 65)

was decided in 1898, before the case of the *Union Bridge Company* had been decided by this court; and he cited

United States vs. Keokuk etc. Bridge Co. (45 Fed. Rep. 178)

United States vs. Rider (50 id. 406)

United States vs. Moline (82 id 592)

as supporting the affirmative of the proposition that Congress could not lawfully delegate the powers contained in the Act of 1892 to the Secretary of War, at the same time observing, however, that the Supreme Court of the United States up to that time had declined to pass upon the question.

Lake Shore etc. Ry. vs. Ohio (165 U. S., 365, 368).

And then he said:

"But if such delegation be possible, it does not follow that so high a discretionary power, involving possible interference with public works authorized by State legislation, can be turned over by the secretary of war to the assistant secretary or an 'acting secretary' of war".

A sound distinction exists under the statutes between the functions of an *Acting* Secretary and those of an *Assistant* Secretary, even though the same individual may at different times and under differing circumstances hold the one position or the other; and had the order of March 10, 1906, been signed by General Oliver as *Acting* Secretary, the question now under consideration would

have been somewhat narrowed by virtue of the provisions of Section 177 of the Revised Statutes.* The designation "*Acting Secretary of War*" following General Oliver's signature would undoubtedly have implied, until the contrary were shown, that one of the conditions had arisen on which he was authorized by Section 177 of the Revised Statutes to act, and would have carried with it *prima facie* proof of his authority to make the order.

Marsh vs. Nichols (128 U. S., 605, 615)

Chadwick vs. United States (3 Fed. Rep. 750, 756)

just as the designation "*Assistant Secretary of War*" subjoined to his signature would carry with it a rebuttable presumption, arising from the face of the order alone, that the making of the order was within the powers of the Assistant.

United States vs. Adams (24 Fed. Rep., 348, 351)

John Shillito Co. vs. McClung (51 id 868, 872)

United States vs. Peralta (19 How. 347)

The presumption, however, in either case is disputable, and it seems to us clear that both upon the law and upon the facts proved below, any presumption of authority in an Assistant Secretary of War to make the order contemplated by the Act of 1899, has been completely negated.

The powers which an Assistant Secretary of War may

*REV. STATS., § 177 reads: "In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease."

lawfully exercise are laid down with precision in written regulations or instructions promulgated by the Secretary of War; and defendants below introduced in evidence (pages 121, 125), as "Defendants' Exhibit 1", a certified copy of the regulations promulgated by Secretary Root under date of December 30, 1903, which were in force at the time of the proceedings now under consideration. *

The office of Assistant Secretary of War was created by the Act of March 5, 1890, (*26 Stat. L., 17*), which also provided that the Assistant Secretary "shall perform "such duties in the Department of War as shall be prescribed by the Secretary or may be required by law." And Section 161 of the Revised Statutes provides that "The head of each Department is authorized to prescribe regulations, *not inconsistent with law*, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it."

It was under the authority of these two statutes that Secretary Root promulgated the regulations or instructions which are in evidence as "Defendants' Exhibit 1"; and it is upon the following provision of those regulations that action by the Assistant Secretary was sought to be justified below:

"Subject to the foregoing conditions and reservations, the jurisdiction of the Assistant Secretary of War will extend to the following military and civil matters

(8) Business under the laws pertaining to the navigable waters of the United States," (page 259).

*A clerical error appears at page 125 of the record stating that "Defendants' Exhibit 1" would be found at page 468 of the record. It is found at page 258 of the reprint.

The reservation, however, *subject to which* jurisdiction was attempted to be conferred upon the Assistant Secretary, expressly reserved to the Secretary of War himself, for *his* final action,

“all cases involving questions of policy [and] the reversal of precedents” (page 259).

Defendants' counsel read in evidence (page 120) a final order made by Secretary of War Elkins under date of January 17, 1893, in a proceeding then pending before him upon charges, like those now before the court, that the Hannibal bridge was an unreasonable obstruction to navigation, which order adjudged, as the final result of such hearing, not only that the Hannibal bridge had been constructed in the manner required by the Act of Congress authorizing the same, but also that it was *not* an unreasonable obstruction to the free navigation of the river. The order was read to the court at page 120 of the record, and may be found in its complete form at page 267 where it was marked for identification only, upon an offer (which was refused by the court,—page 257) to read the same in evidence, made by another of defendants' counsel who had for the moment overlooked the fact that the order was already in evidence.

The materiality of Secretary Elkins' order is that it constituted, within the meaning of the instructions promulgated by Secretary Root, a “*precedent*” that could be reversed only by the Secretary of War himself; so that even if the Secretary *could* lawfully delegate to the Assistant Secretary the discretion reposed in the Secretary personally by the Act of 1899, he nevertheless had not done so, and for the reason that the supposed delegation was expressly subject to a reservation to the Secretary himself of all cases involving a reversal of precedents.

The trial court recognized the soundness of the view for which we are contending, and said (page 123): "The action of *any* Secretary,—under the decision of the [Supreme] Court in the *Union Bridge Company* case,—must be taken as a decree of the court, and so considered"; and then, curiously enough, the learned judge overruled defendants' objection to the admissibility of General Oliver's order of March 10, 1906, declaring, as the reason for his doing so, that it was a lawful order *because* it recited that the Secretary of War had good reason to believe, etc., and *because* it recited that the Secretary of War "hereby notifies" (pages 123, 5). In other words, the learned judge received the order as *conclusive* proof of the facts therein set forth, notwithstanding that the evidence adduced by the government established the contrary.

That Secretary Elkins' order was a "precedent" within the meaning of the rules of the War Department, does not seem to admit of serious dispute. In the statement preceding the opinion of this court in

Union Bridge Co. vs. United States (204 U. S. 364, 372),

a decision by Secretary of War Taft is quoted, which was handed down upon an application for a rehearing of an order made in the matter of the *Union Bridge Company* by his predecessor in office, Secretary of War Root. Secretary Taft there said, after finding certain facts:

" These are the facts that I find independently of any previous adjudication; but, added to this, is the finding of my predecessor, Mr. Root, to exactly the same effect upon which he based an order that the bridge as an obstruction to navigation be abated. This matter is now before me on a peti-

tion for rehearing of Mr. Root's order. As an original question, I should have ruled as Mr. Root ruled, and a fortiori, *because, the orders of this Department are not to be lightly set aside, and are to be treated as a decree in equity would be and be set aside only upon a showing of a palpable error or mistake.*"

Was not the order of Secretary Root in the Union Bridge matter, here referred to, a "precedent" within the meaning of the rules and regulations defining the powers of the Assistant Secretary? And is it not clear that the reservation contained in those rules and regulations was expressly designed to withhold from an *Assistant* Secretary the power to do that which should directly or in legal effect reverse prior action by a Secretary whether then or theretofore in office? And can General Oliver's action of March 10, 1906, be given any effect other than as a reversal of the policy and determination expressed in an order theretofore made by the *head* of the Department?

"*Precedent*" is defined in Black's Law Dictionary as: "An adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or *similar* case afterwards arising, or a similar question of law."

And BOUVIER says: "In determining whether an adjudication is to be followed as a precedent, the following considerations are adverted to. First, the justice of the principle which it declares, and the reasonableness of its application."

JESSEL, M. R., said in *In re Hallett's Estate* (L. R., 13 Ch. D. 696, 712): "First of all, what is the proper use of authorities? This is almost elementary, but I am

“bound to state it, because, as I will show presently, that
 “use has not been made in the case on which I am going
 “to comment. The only use of authorities, or decided
 “cases, is the establishment of some principle which the
 “Judge can follow out in deciding the case before him.”

And in *Walpole vs. Cholmondeley* (7 Term Rep., 138, 148) Lord KENYON Ch. J., said on the same subject: “The principle is the thing which we are to extract from
 “cases, and to apply it in the decision of other cases.”

Judge DILLON states in his work entitled “*Laws and Jurisprudence of England and America*” (Edition of 1894, page 231): “The doctrine [of judicial precedent] “as established is shortly this: that a decision by a
 “court of competent jurisdiction of a point of law lying
 “so squarely in the pathway of judicial judgment that
 “the case could not be adjudged without deciding it, is
 “not only binding upon the parties to the cause in judg-
 “ment, but the point so decided becomes, until it is re-
 “versed or overruled, evidence of what the law is in like
 “cases, which the courts are bound to follow not only in
 “cases precisely like the one which was first determined,
 “but also in those which, *however different in their*
 “*origin or special circumstances*, stand, or are con-
 “sidered to stand, upon the same principle. What is to
 “be observed and remembered is that the adjudged case
 “has an *authoritative* and not merely persuasive force
 “..... In England and in this country a point sol-
 “emnly decided has the force and effect of law, binding
 “the judges in all other cases that clearly fall within its
 “principle, and which the judges are therefore bound to
 “follow and apply, unless, to use Blackstone’s well-
 “known and much criticised qualification, the precedent is
 “‘flatly absurd or unjust.’ ”

BOUVIER says (*Law Dictionary*, Edition of 1897, page 1028): "It is a general maxim that when a point has "been settled by decision, it forms a precedent which is "not afterwards to be departed from."

And Prof. JOHN CHIPMAN GRAY in an article on "Judicial Precedents" published in *9 Harvard Law Review* at page 27, said: "So far as it [judicial precedent] expresses the opinion of wise or learned men, or so far "as it expresses the opinion of the community, it may "be a source of law; but its peculiar force as a judicial *precedent* lies, not in its accordance with philosophy or common sense, not in the fact that it is right, "not that it ought to have been made, but that it *has* "been made;" and *that*, he declares, establishes the decision as a precedent.

The district attorney, in the argument below (pages 120-123) confused the doctrine of *res adjudicata* with that of *stare decisis*; and because it did not appear that the order of Secretary Elkins was founded upon precisely the *same* evidence as was the order of General Oliver, he argued that the order of Secretary Elkins was not a "precedent" and (inferentially) that the reversal of such order was not reserved by the rules and instructions to the Secretary of War himself but might be exercised under those rules by the Assistant Secretary. We do not argue that Secretary Elkins' order was irreversible, either on the evidence upon which it was made or on new evidence; for that question is not involved in this case. (But see *Opinions of Attorneys General*, vol. XIX, pages 283-284; vol. XIII, page 387; vol. V, page 668). What we do urge is that the formal decision made by the Secretary of War in 1893 that the Hannibal bridge was not an unreasonable obstruction to the free

navigation of the river was, until reversed by the Secretary of War himself, as binding upon the officials of the War Department as a decree of a court of equity to the same effect; that General Oliver's order of March 10, 1906, was tantamount to a reversal of such prior decision; and that because it *was* in effect a reversal of such decision it was beyond the scope of the Assistant Secretary's power and was therefore null and void.

POINT IV.

The so-called re-hearing and the written approval by the Secretary of War of July 14, 1906, did not validate the order of March 10, 1906, nor did they tend to prove any of the allegations contained in the information. The admission of the same in evidence, over defendants' objection, was error.

The government put in evidence, over defendants' objection, a certified copy of certain records of the War Department covering the period from March 23, 1906, to July 20, 1906 (pages 137-138), and sought to establish thereby, *as facts*, that defendants had applied for a re-hearing of the order of March 10, 1906; that a re-hearing had been ordered by the Secretary of War; and that upon a report by the Judge Advocate General of the Army of a re-hearing had before *him*, the Secretary of War had formally approved the order made by General Oliver on March 10, 1906, thus drawing the same conclusions in July as had been drawn by General Oliver in the preceding March.

In admitting these records as *proof of the facts* set forth therein,—even assuming that those facts were relevant, as to which see below,—the learned trial court

misapprehended, as it seems to us, the effect that may properly be given to the records of the War Department in a criminal prosecution under the Act of 1899. The sole relevance of those records, as we understand the law, is to enable the court to ascertain whether or not the action of the official in which they culminated was supported by the record upon which he bases his action. The existence or non-existence of the fact set forth in the record, is not, in such a prosecution, before the court for determination. If the establishment of the fact, *as a fact*, is material to the Government's case, then it must be established just as any other material fact must be, in accordance with accepted rules of evidence. The Act of 1899 cannot be construed as establishing a rule of evidence, or as attempting to vary any existing rule.

The record on this so-called re-hearing consisted of the following papers:

(1) A letter from one N. H. Swayne, bearing date March 26, 1906, asking that the order of March 10, 1906, be annulled and that a hearing be granted by the Secretary of War himself, as provided by the law. This letter was further objected to upon the trial below as not binding upon either of the defendants, without proofs *dehors* the letter tending to show that Mr. Swayne was authorized to represent them (pages 138-139). The letter clearly was not competent evidence of any of the facts stated therein.

(2) A memorandum of the Chief of Engineers, endorsed upon such letter, that the Secretary of War desired to give a hearing (page 140).

(3) A letter from the Chief of Engineers returning

Mr. Swayne's letter and its endorsement to the Secretary of War (pages 140-141).

(4) A letter signed by General Oliver, Assistant Secretary of War, addressed to Mr. Swayne, acknowledging his letter of March 26, 1906, and stating that the Secretary of War had authorized the Judge Advocate General of the Army to afford a personal hearing (page 141), but without any proof of the despatch or receipt of the letter.

(5) A memorandum for the Judge Advocate General that the Secretary of War wished to give the parties a re-hearing but was too much pressed with other matters to attend to it personally and wished the Judge Advocate General to hear them (page 142).

(6) A report of a hearing had by the Judge Advocate General addressed to the Secretary of War (pages 142-147). This, too, was not competent evidence of any of the facts stated therein, even that the individuals who are therein reported as having appeared for these plaintiffs in error did so in fact or had any authority whatsoever to represent them.

(7) An endorsement by the Secretary of War, under date of July 14, 1906, made upon the report of the Judge Advocate General, in these words: "Approved. Let the Chief of Engineers act accordingly" (page 147).

(8) Letters bearing date July 20, 1906, signed by General Oliver as *Acting* Secretary of War, addressed respectively to "George A. Mahan, Attorney for Hannibal Bridge Company," "F. A. Delano, President Wabash Railroad Company" and "Noah H. Swayne,

Attorney at law," advising that the Secretary of War had approved the conclusions reached by the Judge Advocate General to the effect that the previous action "*of the Department*" ordering changes in the bridge should stand, and action be taken accordingly (page 148). The record did not purport to show, and no proof was offered which tended to show, that these letters of July 20, 1906, were ever forwarded to or received by the persons to whom they were respectively addressed or that these plaintiffs in error had any knowledge of their existence.

If it should be argued that the letters of July 20, 1906, were in legal effect an order by the Secretary of War under the Act of 1899 to alter the bridge, then not only is such order fatally defective in that it does not specify the changes recommended by the Chief of Engineers that are required to be made, or prescribe a reasonable time in which to make them, or otherwise comply with the statute, but further than that the failure to prove that the order was ever served upon defendants would preclude a conviction under the statute as for a failure to comply with the requirements of that order. Such an argument, moreover, would be wholly irrelevant under the information filed against defendants below, for the information specifically charges the making of the order of *March 10 1906*, and a failure to comply with the terms of *that* order.

The only effect that could be given to the so-called rehearing, if indeed any effect could be given to it at all in this proceeding, is that the action of the Secretary in granting the application of Mr. Swayne (pages 138-139) either *annulled* the previous action of the Department,—in which case the defendants were relieved from all obligation to obey the order of *March 10, 1906*,—or else

suspended the operation of that order pending the re-hearing; and if the latter were the effect of the granting of the application, then the reasonable time of one year within which to make the alterations as recommended by the Chief of Engineers (page 116) and prescribed in the order of March 10, 1906, was cut by nearly four months (from March 26th to July 20th) to the concededly unreasonable time of eight months, thereby rendering the order made against these defendants an unreasonable and, consequently, an *unlawful* order.

Unless some such effect can be given to any order that was made upon the so-called re-hearing, the record of the War Department as to the proceedings which culminated in such an order was wholly irrelevant and should have been excluded; and it cannot be said that the error in admitting it is harmless. The purpose of the district attorney in offering the record was manifestly to impress upon the court and upon the jury that the Secretary of War had later declared himself to be in thorough accord with the conclusions to which General Oliver had come more than four months previously, so that even if General Oliver had legally been without authority to make the order of March 10, 1906, he nevertheless did precisely what his Chief would have done had the hearing been held and the order made by the Secretary of War himself, and that consequently the matter was as broad as it was long, etc., etc. But all this is harmful. The defendants at a criminal bar are entitled to be tried upon the matter contained in the indictment against them; and the improper reception of evidence offered for the purpose, or which may have the effect, of diverting attention from material defects in the indictment, is a substantial invasion of defendants' rights, and the error is a prejudicial one.

POINT V.

The order of March 10, 1906, assuming its validity in other respects, was fatally defective in that it did not specify, with such particularity as to enable the defendants to comply with the order, the changes in the bridge that were required to be made.

The Act of 1899 provides that in giving the notice to alter, the Secretary of War "shall specify the changes "recommended by the Chief of Engineers that are required to be made" (page 41). The fair intent and purpose of such provision is manifest, namely, that the bridge owners shall be so advised in advance of the required changes as reasonably to eliminate the possibility of an honest difference of understanding between them and the Chief of Engineers as to what they are required to do. The order of March 10, 1906, we think, fails to meet such test. It calls for a number of changes, some of which are clearly and precisely expressed while others are ambiguous and uncertain of meaning,—and even impossible of performance,—and do not apprise the plaintiffs-in-error of what would be a compliance, in the mind of the Secretary of War or of the Chief of Engineers, with the terms of the order. For instance, the requirements (pages 4-5) that the west draw-rest pier (first pier from Missouri shore) should be converted into a pivot pier; that a new west draw-rest pier should be constructed near the Missouri shore (its precise location being fixed by the later requirements as to the width of the new draw span); that the present pivot pier should be cut down and converted into an east draw-rest pier; that the present draw span should be moved west; that the existing cribs and crib piers should be removed; that each of the draw openings on the new location of the

draw span should give at all stages of the river a clear width of water-way of not less than 160 feet; that the new and remodeled piers should be so constructed as not to necessitate the use of rip-rap or other protection around their bases; and that as large a water-way as possible should be given between all new and remodeled piers,—are, all of them, requirements that are specific and clear in their statement and fairly apprise the bridge owners of precisely what they are to do.

But the other requirements of the order do not. They are (1) that “new and solid long or protection piers, of crib work”, should be built “above and below” the new pivot pier; (2) that “proper” guard fences should be built along the Missouri shore “above and below” the new shore pier; and (3) that the 160 foot waterway required for each of the new draw openings must be available “at all stages of the river” for boats drawing 6 feet of water (page 5). This last requirement will be considered under the next succeeding point of our argument. As to the other two requirements,—that “new and solid long or protection piers of crib work” were to be built above and below the new pivot pier, and that “proper” guard fences should be built along the Missouri shore above and below the new shore pier,—who was to construe these requirements? How long were the “long or protection piers” above and below the new pivot pier to be? One hundred feet or one thousand feet? Either distance would constitute a “long” pier. Was the protection pier above the new pivot pier to be the same length as that below, or was one to be longer or one shorter, and if so which? What was there in the order that would apprise the bridge owners of *how* long either of these protection piers was to be? Must they take the risk of a guess at what the Chief of Engineers had in mind

when he recommended the building of "long or protection piers" above and below the pivot pier, and justify the correctness of their guess only on the trial of a criminal information filed against them because, in the judgment of the Secretary of War, they did not guess right? It does not seem to us that any such burden or risk is placed by the statute upon bridge owners who are compellable, at their own expense, to make changes recommended by the Chief of Engineers. Whose judgment was to control as to what would constitute a "proper" guard fence along the Missouri shore? How far above and how far below the new shore pier must it be constructed? One hundred feet or one thousand feet, or two thousand? What was to be the material of its construction? How high above the stages of high water was it to extend? The term "proper" would undoubtedly include an answer to each of these queries; but who, except the courts, is to determine what is "proper." Does an order to construct "proper" guard fences, fairly "specify" the changes the bridge owners are required to make, within the meaning of the statute? Have they any way of knowing from the order what the Secretary will regard as a compliance with this requirement? Must they not here, too, guess and spend their money in constructing what *they* consider to be a proper guard fence and never know, until the end of a criminal prosecution against them, whether or not they guessed right? If an order to construct a "long" protection pier or a "proper" guard fence is a sufficient compliance with a statute that directs the Secretary of War to specify in his order the changes that are required to be made, why would not an order to alter the bridge "in such manner as to render navigation through or under it free, easy and unobstructed," also be a sufficient com-

pliance with the statute? The two forms of order would be in the same category, so far as apprising the bridge owners of the changes they are to make is concerned; and yet the latter form of order was expressly condemned in

United States vs. Keokuk etc. Bridge Co. (45 Fed. Rep. 178)

where the opinion was written by Judge SHIRAS. The court there said:

“The next ground of demurrer is that, granting in a given case that the secretary of war might lawfully possess and exercise the power to require the owners of a bridge over a navigable river to change or alter the construction thereof * * * nevertheless, to put the owner of the bridge in default the notice given under the statute must point out or define in some mode what changes or alterations are required to be made. In considering this question regard must be had to the character of the statute sought to be enforced.

“The section of the act which is the basis of this proceeding is penal in its nature, and the action is to recover a penalty for an alleged violation of its provisions. It is a fundamental rule in regard to such statutes that, to be enforceable, they must be free from ambiguity and uncertainty; or, in other words, before the citizen can be punished for a failure to obey the statute, it must be made clear what he is required to do or to abstain from doing. * * * In the present case, assuming that the secretary of war had the power to decide that the bridge owned by the defendant company was an obstruction to navigation, and must be altered or remodeled, was it enough for him to simply decide that it was an obstruction and then to notify the defendant that the bridge must be remodeled without pointing out in what the obstruction to the navigation consisted, or

what change or alteration was required to be made?

"It would seem that in some fair way the bridge company should be notified of what was required of it before it could be adjudged to be in default, and be subjected to a fine; or, in other words, the secretary should declare in what particular the bridge should be rebuilt, remodeled, or changed, *so that the owner thereof could reasonably know what was expected of him.* * * * Unless properly notified of what was expected of the company, the latter might make many and costly changes in the bridge, and still be liable to punishment because it had failed to make the changes which the secretary had in mind, but had failed to declare or make known to the Company. Thus the company, under a general notice to alter its bridge, might at great expense increase the height thereof, and then be fined for not widening the spans between the piers, or *vice versa.* * * * If, under this notice, the company had expended thousands of dollars in remodeling the bridge, and it had then been sued because the navigation of the river was not free, easy and unobstructed on account of the bridge, *what criterion could be appealed to for determining whether the company had met or failed to meet the requirements of the notice served upon it?* If the notice itself had pointed out *specifically* what was required of the company, then it might be shown that these requirements had or had not been complied with; but the notice, as served, *gives no criterion for determining what was expected of the company,* except that the navigation of the river must be left free, easy, and unobstructed; which requirement cannot be met except by wholly removing the bridge."

POINT VI.

Even if the changes ordered to be made may be held to have been specified in the order of March 10, 1906, with the particularity required by the statute, they nevertheless were impossible of performance unless defendants below should consent to excavate through the rock, at their own expense, a new channel for the river; and this they were unwilling to do. The order was consequently an unlawful order, and the court below erred in excluding the evidence, offered by defendants, which tended to show that a compliance with the order necessarily involved the excavation by the defendants of a new channel through the rock.

The order required that each of the draw-openings on the new location of the draw-span should give at *all* stages of the river a clear width of water-way of not less than 160 feet, *available for boats drawing six feet of water* (page 5).

How possibly can the bridge owners comply with this requirement? If it be a fact,—and the court excluded our evidence tending to show that it is a fact,—that with the new draw-span located precisely as called for by the order and having at all stages of the river, (which includes the stage of low water) a clear width of water-way in each of the draw openings of not less than 160 feet,—if it be a fact that with a draw span so located the westerly draw-opening would *not* be available, at low stages of the river, for boats drawing six feet of water, and for the reason that for nearly one-half the width of that draw-opening there would be but from two and a half to four or five feet of water (See Defendants' Exhibits 5, 6 and 7, pages 276-277, 280),—how possibly can the bridge owners comply with such requirement? The order, therefore, in this particular required the bridge owners,—unless they were willing to excavate through

the rock, at their own expense, a new channel for the river under the westerly span of the draw,—to do that which it was physically impossible to do; and yet because they did not do it, as the statute was construed by the learned court below, they were convicted as for a crime; and the several fines of \$5,000. imposed upon them rested in part upon their failure to do the impossible.

The power conferred upon the Secretary of War by statute is to compel alterations by bridge-owners in the *bridges* which they own or control; and we shall not take space to argue that he is powerless to compel those owners to spend their money on any such general improvement as altering the course of a river, or dredging the natural bed thereof to make a new channel where none existed before, or to deepen one already existing. The proposition is obvious; and yet that is precisely what General Oliver's order of March 10, 1906, required these plaintiffs in error to do, unless the order be construed as requiring them to do an impossibility. In either case, the order would be unreasonable and therefore not a lawful order.

At the close of the Government's case we offered proof tending to show that with the change in the location of the draw-span that was required by the order, the westerly draw opening would, at low stages of the river, be impassable for approximately one-half of its width for boats drawing six feet of water, and for the reason that at such stages of the river there would be but from 2-1/2 to 4 or 5 feet of water in that draw-opening (See *Defendants Exhibits 6 and 7*, pages 277, 280); and we further offered proof tending to show that the same general condition in the natural bed of the river extended for a distance of at least 1,100 feet above and 1,200 feet below the

bridge (See *Defendants' Exhibit 5*, page 276). But the learned trial judge excluded all such evidence. It was pointed out to him that the order required the new draw-span to be in a particular spot, that the west draw-opening must be of a width of not less than 160 feet in the clear and available at all stages of the river for boats drawing six feet of water, and that we wanted to show this to be a physical impossibility at low stages of the river, unless the natural river-bed should be dredged under the westerly draw-span, as it was required to be located. We argued that the Secretary could not lawfully compel the bridge owners to dredge a new channel through the rock, and yet the making of that 160 foot draw-opening available, at *all* stages of the river, for boats drawing six feet of water was one of the requirements which the Secretary had imposed upon them; and we submitted that the order was consequently unreasonable and therefore not a lawful order. But the learned judge observed (bottom of page 255): "*I am not going to consider the question of reasonableness or unreasonableness of the order.*"

Counsel said (page 256): "Now I think your Honor will admit that if we could, if it were feasible,—take an exaggerated instance,—to introduce evidence that a compliance with this order would make an absolutely wall dammed river, by which *no* boat could pass, it would be admitted that the order accomplished nothing because it was unreasonable and unlawful. What we do intend to show in our defense is that the order which the Assistant Secretary of War made is such as not only to close half the channel but compel us to excavate a new channel. And there is no authority in the Secretary of War to compel us to do that.

"THE COURT: I do not purpose to go into that question

“ I do not propose to let you go into all these “things. You understand my position in this case and “if I am wrong it may be corrected. I shall hold that “the order of the Secretary of War, made in this particular case, should have been obeyed. If it could not “be obeyed,—*I am not going to sit here and hear whether “it could or could not*” (pages 256-257).

We respectfully submit that the defendants below were, by these rulings of the trial court, denied their right of defense at a criminal bar, and that the error here complained of calls of itself for a reversal of the judgment of conviction.

POINT VII.

Assuming that the order of March 10, 1906, was a lawful order, there still was an entire failure of proof of the service of same upon defendants below, as is specifically required by the Statute.

The defendants stand convicted of a definite crime with which they are charged in the information, to wit, the violation of a lawful order made by the Secretary of War on March 10, 1906, duly served upon them. The issue presented by the information was, therefore, three-fold:

- (1) Was a lawful order made;
- (2) Was it served; and
- (3) Was it obeyed.

Assuming for a moment that all questions heretofore considered in this brief are resolved in the Government's favor, we still insist that the conviction was erroneous because no competent proof was adduced below of the service of the order upon either of the defendants.

To establish the service which the information charged, the Government relied upon the records of the War Department and proved simply that there were on file in that Department *ex parte* affidavits of various individuals setting forth that they had made service of the order at the times and upon the individuals stated (pages 126-137). Notwithstanding the strenuous objections urged by counsel, the learned trial court admitted these affidavits as *proof of the facts* set forth therein, and in so doing misapprehended, as it seems to us, the effect that may properly be given to the records of the War Department in a criminal prosecution under the Act of 1899. The sole relevancy of those records, as we have urged in a preceding point of this brief, is to enable the court to ascertain whether or not there was proof before the Secretary that would support the discretion he exercised under the statute in making the order; and if it appears from the record that there was such proof, then neither the court nor the jury may weigh the proof contained in the record and substitute a different conclusion therefrom for the conclusion that was drawn by the Secretary. This much, we are bound to concede; and although we sincerely believe that the conclusions drawn by General Oliver, the Assistant Secretary, were erroneous and grossly unjust to these defendants, and that we have been wrongfully deprived, as above pointed out, of our right to establish the *fact*, we are further bound to concede that *some* of the evidence taken upon the hearing at Rock Island would tend to support those conclusions, and this court consequently may not review the record for the purpose either of affirming or of reversing General Oliver's conclusions.

That, however, it seems to us, is as far as the records of the Department may properly be held to be competent

or relevant; and it must be perfectly clear that even such competency and relevancy is, by the very nature of the rule, limited to the proceedings had *prior* to and which culminated in the order of March 10, 1906, and that nothing which occurred in the Department *after* that order was signed, constituted or could constitute any part of the record upon which the order was made. The admission in evidence of the record of proceedings had in the Department *subsequently* to March 10, 1906, was therefore error; and yet it is upon those records that the Government relies for its proof of the *fact* that the order was served (pages 126-137).

The defendants below stood at the bar of justice charged with a crime. They had a constitutional right to stand mute and put the prosecution to its proof. They were entitled by the law of the land to be confronted with the witnesses against them touching every material *fact* with which the Government sought to charge them; and the court below was powerless to deprive them of those rights. If anything is still left of the constitutional safeguards which were the boast of our jurisprudence in years gone by, those rights should be sacredly preserved. They are the corner stone of the structure. And neither considerations of convenience or expense to the prosecution, nor even an apparent *probability* of an unproved fact, may be held to justify a denial of those fundamental rights to a defendant who stands charged with a violation of the law in a criminal court of justice.

POINT VIII.

The court below erred in its charge to the jury as set forth in the twenty-first assignment of error.

The assumption throughout the charge was that the action of the Assistant Secretary was, within the meaning of the statute, the action of the Secretary himself; and this, for reasons we have elaborated above, we believe to have been prejudicial error in the charge.

The charge was also erroneous, as it seems to us, in that it declared that neither the court nor the jury could "discuss or try or determine the question of whether "the changes directed to be made in this bridge were "improper or not" (page 291).

We have already urged the reasons why we think this conception of the law was erroneous, and will merely restate them here. If the changes directed to be made were in violation of a contract right existing between the Bridge Company and the Government, then a direction by the Secretary of War to make those changes was improper, and it was the duty of the court both to try and to determine the *fact*. If the changes directed to be made were not specified in the order with the particularity which the statute requires, then the changes as directed were not proper changes, and it was the duty of the court to pass upon and determine this question. If the changes directed to be made were impossible of performance, they clearly may not be held to have been proper changes, and it was the duty of the court both to try and to determine that fact.

POINT IX.

The court has ample jurisdiction to determine whether an act of an official of an executive department is authorized by the statute under which he assumes to act.

School for Magnetic Healing vs. McAnnulty
(187 U. S., 94, 104);
Bates & Guild Co. vs. Payne (194 id 106, 108);
Nat'l Life Ins. Co. vs. Nat'l Life Ins. Co. (209
id 317, 326).

POINT X.

The judgment of conviction should be reversed, and as the proceeding was based upon an unlawful order which from its very nature cannot be validated upon a new trial, the information should be quashed and the plaintiffs in error discharged.

Respectfully submitted,

R. BURNHAM MOFFAT,
Attorney and Counsel for
Hannibal Bridge Company.

December, 1910.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE HANNIBAL BRIDGE COMPANY AND The Wabash Railroad Company, plaintiffs in error, <i>v.</i> THE UNITED STATES.	}	No. 100.
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*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MISSOURI.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

Plaintiffs in error were jointly convicted in the District Court of the United States for the Eastern District of Missouri, upon a criminal information which charged them with having failed to comply with an order of the Secretary of War, issued March 10, 1906, pursuant to section 18 of the rivers and harbors act of March 3, 1899 (30 Stat., 1153), requiring them to make certain alterations in the bridge across the Mississippi River at Hannibal, Mo., owned or controlled by them, so as to render navi-

gation under and through it free and easy (R., 2, 21). They were each sentenced to pay a fine of \$5,000 (R., 22). Motions for a new trial and in arrest of judgment having been overruled, this writ of error was sued out under the authority of said section.

The facts, as shown by the record, leading up to these criminal proceedings, and which have an important bearing upon some of the propositions now urged upon this court by plaintiffs in error, may be thus summarized:

As a result of petitions addressed to the Secretary of War by a large number of steamboat owners, masters, pilots, and others in the early part of 1905 (R., 79-81), calling attention to the dangerous character of the Hannibal Bridge, which it was said had occasioned the loss of four steamboats and from two to fifteen lives on each boat, the matter was referred to the engineer officer at Rock Island, Ill., Maj. J. L. Lusk, for investigation (R., 82). That officer reported that the bridge was an unreasonable obstruction to navigation "by reason of the wrong location of the draw spans, the absence of guard fences or sheer booms, and the deposit of riprap in considerable quantities about the piers and abutments," and recommended certain changes (R., 83-85). This report was concurred in by the Chief of Engineers, Brig. Gen. Mackenzie (R., 86).

A hearing, as contemplated by the statute, was thereupon held before Maj. Riche, the engineer officer at Rock Island, Ill., June 6, 1905 (R., 149), prior notices having been served upon the parties in inter-

est, advising them of the date of the hearing, its object, and specifying the proposed alterations in the bridge required to make navigation free and easy (R., 87 et seq.). Notice of the hearing was also published in the newspapers of St. Paul, Minn., St. Louis, Mo., and Hannibal, Mo. (R., 97).

Plaintiffs in error were represented at the hearing by their attorneys and the bridge engineers (R., 149-150). There were also present certain river men who favored the proposed bridge alterations (R., 149). Statements (R., 171-200), made in response to inquiries by the War Department, and affidavits (R., 218-234), made by masters, pilots, and others, all going to show the dangerous character of the bridge and the necessity for alterations, were submitted. Counter affidavits were submitted on behalf of plaintiffs in error by their counsel (R., 150-151, 156, 201-218). Every opportunity was afforded the plaintiffs in error to present their case fully and to examine all the evidence in the possession of the Government bearing upon the matter (R., 150); in fact, all the papers, together with the brief thereon of the river interests, were turned over to counsel for the bridge interests "for the purpose of enabling him to prepare an opposition brief (R., 111). No objection whatsoever to the manner of conducting the hearing was made by the representatives of plaintiffs in error present.

After the hearing, all the papers in the case were returned by Maj. Riche to the War Department,

with the recommendation that the proposed alterations in the bridge be required (R., 110-113). This report was approved by the Chief of Engineers, with the recommendation that notices be issued to the proper officials of the company owning or operating the bridge (R., 116). Notices, dated March 10, 1906, were accordingly served upon plaintiffs in error directing them to make the alterations specified on or before March 15, 1907, these notices being in the name of the Secretary of War and signed by the Assistant Secretary of War (R., 128 et seq.).

Application was then made to the Secretary of War, then Mr. Taft, on behalf of the plaintiffs in error, for a hearing before him personally, with a view to securing the annulment of the order of March 10, 1906 (R., 139). The Secretary granted the hearing (R., 140), but directed that it be held by the Judge Advocate General of the Army (R., 141). A hearing was accordingly had, at which the plaintiffs in error were fully represented, no representatives of the river interests being present (R., 142-143). Supplementary briefs and statements were filed by the bridge interests (R., 143). The Judge Advocate General then made his report to the Secretary of War, in which he recommended adherence to the prior action taken by the Department (R., 142-147). The Secretary personally approved this report and directed that "the Chief of Engineers act accordingly" (R., 147). Notices to this effect, dated

July 20, 1906, were thereupon sent by the Acting Secretary of War to the representatives of plaintiffs in error (R., 148).

The time allowed for making the alterations by the order of March 10, 1906, and three months additional, having expired, and plaintiffs in error having taken no steps indicating an intention to comply with the order of the Secretary (R., 245-246), these criminal proceedings were instituted pursuant to the statute.

STATUTES.

The pertinent portions of the act of July 25, 1866 (14 Stat., 244), which authorized the construction of the Hannibal bridge, among others, read as follows:

CHAP. CCXLVI.—An act to authorize the construction of certain bridges, and to establish them as post roads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for any person or persons, company or corporation, having authority from the States of Illinois and Missouri for such purpose, to build a bridge across the Mississippi River at Quincy, Illinois, and to lay on and over said bridge railway tracks, for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge, under the limitations and conditions hereinafter provided. And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the District Court of the United States of any State in which any portion of said obstruction or bridge touches.

SEC. 2. *And be it further enacted*, That any bridge built under the provisions of this act may, at the option of the company building the same, be built as a drawbridge, with a pivot or other form of draw, or with unbroken or continuous spans: *Provided*, That if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation in any case than fifty feet above extreme high-water mark, as understood at the point of location, to the bottom chord of the bridge, nor shall the spans of said bridge be less than two hundred and fifty feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river and not less than three hundred feet in length: *And provided also*, That if any bridge built under this act shall be constructed as a drawbridge, the same shall be constructed as a pivot drawbridge with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw, and the next adjoining spans to the draw shall not be less than two hundred and fifty feet; and said spans shall not be less than thirty feet above low-water mark, and not less than ten above extreme high-water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current of the river: *And provided also*, That said draw shall be opened promptly upon reasonable signal for the passage of boats, whose construc-

tion shall not be such as to admit of their passage under the permanent spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw during or after the passage of trains.

SEC. 3. *And be it further enacted*, That any bridge constructed under this act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post route; upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge.

* * * * *

SEC. 5. *And be it further enacted*, That a bridge may be constructed at the town of Hannibal, in the State of Missouri, across the Mississippi River, so as to connect the Hannibal and Saint Joseph Railroad with the Pike County and Great Western railroads of Illinois, on the same terms and subject to the same restrictions as contained in this act for the construction of the bridge at Quincy, Illinois,

* * * * *

SEC. 13. *And be it further enacted*, That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved.

Section 18 of the act of March 3, 1899 (30 Stat., 1121, 1153), provides:

SEC. 18. That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary

of War, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: *Provided*, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court, either by the United States or by the defendants.

Sections 9 and 10 of the act of August 11, 1888 (25 Stat., 424-425):

SEC. 9. That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an obstruction to the free navigation of such waters, by reason of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the raft span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary to give notice to the persons or

corporations owning or controlling such bridge to so alter the same as to render navigation through or under it free, easy, and unobstructed; and in giving such notice he shall prescribe in each case a reasonable time in which such alteration is to be made. If, at the end of such time, the alteration has not been made, the Secretary of War shall forthwith apprise the Attorney General of the United States, whose duty it shall be to institute suit, in the name of the United States, without delay, in the circuit or district court of the United States for the circuit in which such bridge is located, which court is hereby invested with jurisdiction for this purpose, to recover from the owners or managers of such bridge the fines mentioned in the succeeding sections of this act.

SEC. 10. That the owner or owners or manager or managers of any railroad or other bridge obstructing the free navigation of any navigable waterway of the United States who shall willfully fail or refuse to remove the same, or to cause the necessary alterations to be made in the same so as to render navigation through or under it free, easy, and unobstructed to rafts, steamboats, or other water craft, after receiving notice to that effect from the Secretary of War and within the time prescribed by him, shall be subject to a fine as penalty therefor of five hundred dollars per month for the time he or they are in default, and the amount so recovered shall be placed to the credit of the improvement fund of the water-way obstructed by such bridge.

QUESTIONS PRESENTED.

The assignments of error upon which plaintiffs in error state they propose to rely (Brief, pp. 34-38) present in substance the following propositions:

1. Whether the power conferred upon the Secretary of War by section 18 of the act of March 3, 1899 (30 Stat., 1121, 1153), may be exercised with respect to the Hannibal bridge, constructed under authority of the act of July 25, 1866 (14 Stat., 244).

2. Whether the alterations specified in the notices served upon the plaintiffs by the Secretary of War were set forth with sufficient particularity.

3. Whether the notice to alter, signed by the Assistant Secretary of War, met the requirements of section 18 of the act of March 3, 1899, which provides for notice by the Secretary of War, and whether there was a variance between the information and the proof in this respect.

4. Whether the hearing accorded the plaintiffs in error satisfied the requirements of section 18 of the act of March 3, 1899.

ARGUMENT.

I.

The power conferred upon the Secretary of War by section 18 of the act of March 3, 1899 (30 Stat., 1121, 1153), may be exercised with respect to the Hannibal Bridge, although constructed pursuant to the act of July 25, 1866 (14 Stat., 244).

There would seem to be no fair ground to question the application of section 18 of the act of March 3, 1899, to bridges constructed under authority of an act of Congress. In terms it applies to "*any* railroad or other bridge now *constructed*, or which may hereafter be constructed, over *any* of the navigable waterways of the United States." Broader or more comprehensive language could not be used.

It is significant that this question was not made in the lower court, either upon the demurrer to the information (R., 16) or upon the motion of the defendants for a directed verdict (R., 246-247). On the contrary, the power of the Secretary of War under the act of March 3, 1899, to require the alteration of the Hannibal Bridge, notwithstanding the act of July 25, 1866, was expressly conceded. Thus, the record shows (p. 256):

The COURT. Under this act, according to the construction the court places upon it, the Secretary of War was authorized to investigate the question as to whether this bridge was an obstruction to navigation. It was within his

power to give notice of a hearing and to get testimony. If upon that testimony he believed that this bridge in the river obstructed the free navigation of the river, he had a right to direct such alterations in the bridge and to change it as he saw proper, notwithstanding the act of 1866.

Mr. MAHAN. I agree with your honor. I do not contend he did not have a right to change it notwithstanding the act of 1866. I do not think, your honor, that is involved at all. But under the act of 1899 he must make a *lawful* order, and hence a *reasonable* order, and that was the theory upon which I was going to address the jury.

Mr. MOFFAT. I think we can save a good deal of time by understanding the issues here. There are only three:

First, was the order made?

Second, was it served?

Third, was it followed?

The first legislation authorizing the Secretary of War to require persons or corporations owning or controlling bridges across navigable waters of the United States to alter the same to meet the needs of navigation was contained in sections 9 and 10 of the act of August 11, 1888, chapter 860 (25 Stat., 400, 424). Previously, the Secretary of War, by section 8 of the act of July 25, 1884 (23 Stat., 123, 148), had been authorized to require the company or persons owning, controlling, or operating any such bridge, constructed "under authority of the United States or of any State or Territory," to cause aids to the passage of the

draw opening or raft span thereof to be constructed at their own cost and expense. But, as stated, the act of August 11, 1888, was the first which went to the extent of authorizing the Secretary of War to require the *alteration* of bridges across the navigable waters of the United States to meet the needs of navigation.

The history of the act of August 11, 1888, is instructive in respect to its application to bridges constructed under specific authority from Congress.

By section 4 of the river and harbor act of August 5, 1886 (24 Stat., 310, 330), it was provided that the Secretary of War should report to Congress "whether any bridges, causeways, or structures now erected or in process of erection do or will interfere with free and safe navigation." Pursuant to this statute, the Secretary of War, under date of December 10, 1887, transmitted to the House of Representatives, as his letter of transmittal states, "a letter of the 8th instant from the Chief of Engineers, together with copies of reports of officers in charge of river and harbor districts, received since February 21, 1887, and made to meet the requirements of section 4 of the river and harbor act of August 5, 1886, requiring that report be made to Congress whether any bridges, causeways, or structures of any kind now erected, or in process of erection, do or will interfere with free and safe navigation." This report was duly received by the House and directed to be printed. It is embodied in Executive Document No. 12 of the House of Representatives, Fiftieth Congress, first session,

entitled, "Bridges, etc., Interfering with Navigation." (House Executive Documents, vol. 18, No. 12, p. 17.)

The reports of the engineer officers in charge of river and harbor districts throughout the United States, included in the Secretary's report, referred to a number of bridges erected across various navigable rivers which had been constructed under Federal and State authority. It also included the following report in regard to the Hannibal and other bridges across the Mississippi River (Ex. Doc., vol. 18, No. 12, p. 17):

REPORT OF CAPTAIN E. H. RUFFNER, CORPS OF
ENGINEERS.

UNITED STATES ENGINEER OFFICE,
Quincy, Ill., October 31, 1887.

SIR: In compliance with General Orders No. 7, current series, Headquarters Corps of Engineers, I have the honor to report, in reference to "bridges, causeways, or structures, now erected or in process of erection," between the Des Moines Rapids and the Illinois River "that do or will interfere with free and safe navigation."

The "sheerboom" provided recently for the Quincy Bridge has been placed in good order, so that this bridge is as little of an obstruction as can be expected.

The Louisiana Bridge has, in its present condition, probably the safest and easiest passed drawbridge on the lower part of the Upper Mississippi River.

The Hannibal Bridge is a great obstruction, and the company owning it seem not inclined to do anything for the amelioration of the

difficulty of navigation caused by the bridge. A plan was prepared at one time by the bridge company, as a result of the action of Maj. Mackenzie, for the construction of a sheerboom from the west draw pier to the main shore.

This plan in all its details was, upon the recommendation of Maj. Mackenzie, approved by the Secretary of War. About the time the company was said to be ready to purchase material, an opposition to the plan arose among the lumbermen whose rafts passed the bridge. These parties claimed that although at one time they had approved this very plan, subsequent experience taught them that their own business would be injured if they could not use the west or shore span in passing the bridge. At their urgent recommendation the construction of the sheerboom was postponed for the present.

Since that time correspondence has been had with the bridge company and a personal interview with one of their representatives, in which the company was invited to submit an alternative plan or to give some indication of their intentions. Nothing has been received, however, by me, and the matter stands just where it did a year ago. Alternative plans have been discussed slightly, but nothing definite can as yet be proposed, though, undoubtedly, something ought to be done by the bridge company, and that without further delay.

Very respectfully, your obedient servant,

E. H. RUFFNER,

Captain of Engineers.

THE CHIEF OF ENGINEERS, U. S. A.

Following upon this report, Congress, at the same session, enacted section 9 of the act of August 11, 1888, which, like section 18 of the act of March 3, 1899, now in force, applied to "*any* railroad or other bridge *now constructed*, or which may hereafter be constructed, over *any* of the navigable waterways of the United States" which might be found by the Secretary of War to be "an obstruction to the free navigation of such waters, by reason of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the raft span of such bridge by rafts, steamboats, or other water craft." Section 10 of the same act provided a penalty of five hundred dollars per month for a failure to remove such a bridge or alter the same in accordance with the directions of the Secretary of War.

In reporting the bill which became the act of August 11, 1888, the House Committee on Rivers and Harbors said (H. R. Rept. No. 1495,¹ 50th Cong., 1st sess.):

GENERAL LEGISLATION.

* * * * *

Section 9 deals with railroad and other bridges which obstruct the free and easy navigation of the waterways of the Government, and provides how the evil may be remedied.

As in passing section 9 of the act of August 11, 1888, the attention of Congress, in response to its own request for such information, was thus expressly

called to the Hannibal bridge, among other bridges erected under the authority of Congress; as the language of the statute is all inclusive, and as it made no exception of any such bridges, there can be no question as to its applying to all bridges erected under its authority in general, and to the Hannibal bridge in particular.

Section 9 of the act of August 11, 1888, was amended by section 4 of the act of September 19, 1890 (26 Stat., 426, 453), chapter 907, by the insertion of the word "unreasonable" before the words "obstruction to the free navigation of such waters" and by providing that the Secretary of War, in giving notice, should give the parties "reasonable opportunity to be heard." Section 5 of the same act amended section 10 of the act of August 11, 1888, by making a failure to comply with the lawful order of the Secretary of War a misdemeanor, punishable on conviction by fine not exceeding \$5,000, and that every month the parties remained in default should be deemed a new offense.

Then followed the act of March 3, 1899, chapter 425 (30 Stat., 1121), by which Congress extended its supervision over the navigable waters of the United States and conferred even larger powers upon the Secretary of War in that respect. By section 9 of that act the construction of any bridge, dam, etc., over a navigable water was forbidden until the consent of Congress had been obtained and the plans approved by the Chief of Engineers and the Secretary

of War, except that a bridge might be authorized by a State legislature across a navigable water lying wholly within its limits when the location and plans thereof were submitted to and approved by the Chief of Engineers and the Secretary of War before construction was commenced. Section 10 of that act prohibited "the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States." Section 11 authorized the Secretary of War to establish harbor lines for the preservation and protection of harbors. ^X Other provisions of a similar nature for the protection of navigable waters were contained in the act, to be administered by the Secretary of War. By section 18 the provisions of the act of August 11, 1888, as amended by the act of September 19, 1890, authorizing the Secretary of War to require the alteration of bridges, were reenacted.

It is manifest from the history of the above legislation that Congress has thereby established a comprehensive system for the supervision and control of the navigable waters of the United States to be administered by the Secretary of War, and that his authority in respect to railroad or other bridges across such waters extends, as section 18 of the act of March 3, 1899, in terms states, "to *any* railroad or other bridge *now constructed*, or which may hereafter be constructed, over *any* of the navigable waterways of the United States." As a very large proportion of the bridges across the more important

^X The act of September 19, 1890, above cited contained similar provisions (26 Stat. 454-5, secs. 7-12), so that in the respects mentioned the act of March 3, 1899, was substantially a reenactment of that act.

navigable waterways have been constructed under acts of Congress similar to that under which the Hannibal and other bridges across the Mississippi River were constructed, it is manifest that the purpose of Congress would be practically defeated if such bridges were held to be excepted from the operation of the statute in question.

This court recognized the broad policy of Congress in this respect in *Union Bridge Company v. United States* (204 U. S., 364), where, as in the subsequent case of *Monongahela Bridge Company v. United States* (216 U. S., 177), the constitutionality of section 18 of the act of March 3, 1899, was sustained in respect to certain bridges erected under the authority of the State of Pennsylvania. Speaking by Mr. Justice Harlan, the court, in holding that the statute referred to involved no unlawful delegation of power, said (pp. 385-386):

* * * It has long been the policy of the Government to remove such unreasonable obstructions to the free navigation of the waterways of the United States as were caused by bridges maintained over them. That such an object was of common interest and within the competency of Congress, under its power to regulate commerce, everyone must admit; for commerce comprehends navigation, and therefore to free navigation from unreasonable obstructions is a legitimate exertion of that power. (*Gibbons v. Ogden*, 9 Wheat., 1, 189, 190.) As appropriate to the object to be

accomplished, as a means to an end within the power of the National Government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require National legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty

of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power. * * *

It will be observed that the system of control which Congress has established over the navigable waters of the United States, to be exercised through the Secretary of War, has been a progressive one. It is unreasonable to suppose, therefore, that the authority of the Secretary of War, in respect to bridges across the navigable waterways of the United States, under section 18 of the act of March 3, 1899, was intended to be less than his authority under section 8 of the act of July 5, 1884 (23 Stat., 148), authorizing the Secretary to require the persons or company owning or controlling such bridges to cause aids to navigation to be constructed, which act referred specifically to bridges constructed "under authority of the United States or of any State or Territory." If any inference can properly be drawn from the omission of this phrase from the acts of August 11, 1888, and March 3, 1899, it is that Congress regarded this qualification as unduly restrictive, because under it the power of the Secretary might not extend to bridges constructed without governmental authority, Federal, State, or Territorial. As will hereafter appear, in *United States v. Keokuk & H. Bridge Co.* (45 Fed., 178) the court held that it was only to such bridges that the act of August 11, 1888, applied.

Further regulations in regard to bridges thereafter constructed under authority of Congress were contained in the act of March 3, 1906, chapter 1130 (34 Stat., 84). Sections 4 and 5 of that act confer like power upon the Secretary of War with respect to the alteration of bridges erected or maintained under the provisions of that act to that granted him by section 18 of the act of March 3, 1899, with respect to bridges across the navigable waterways of the United States generally.

The rule generalia specialibus non derogant has no application.

The act of July 25, 1866, under which the Hannibal Bridge was constructed, provided (14 Stat., 244, 246):

SEC. 13. *And be it further enacted*, That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved.

The bridge in question was therefore constructed with express notice of the fact that Congress might at some future time require its alteration "so as to prevent or remove all material obstructions to the navigation of said river." The power of Congress in the premises can not therefore be questioned.

As above pointed out, section 9 of the act of August 11, 1888, the first act in which Congress undertook to require the alteration of bridges, and section 18 of the act of March 3, 1899, under which the present proceeding is had, applies to "any rail-

road or other bridge *now constructed*, or which may hereafter be constructed, over *any* of the navigable waterways of the United States."

There is no inconsistency between these statutes and the act of July 25, 1866. On the contrary, in view of the express reservation of power to do the very thing that is provided for in those acts, there is complete harmony of purpose between them. The later statutes are the natural and anticipated complement of the former.

If the statutes referred to are applicable to any bridges whatever, it would seem that they should be held applicable to those bridges authorized by Congress as to which the power to require alterations was expressly reserved. Thus, Attorney General Moody, in an opinion relating to the authority of Congress to require the alteration of certain bridges across the Ohio River, constructed under authority of the act of July 14, 1862 (12 Stat., 569), by which the right to alter or amend the act for that purpose was not expressly reserved, said (25 Op. A. G., 212):

In his opinion in the *Bellaire Bridge case* (22 Opin., 343, 347), Attorney General Griggs, who took the view above expressed as to the principles to be deduced from the case of *Bridge Company v. United States* (105 U. S., 470), was of opinion that section 4 of the act of September 19, 1890, which was superseded by section 18 of the act of March 3, 1899, and which conferred like authority upon the Secretary of War in respect to bridges over the navigable waterways of the United States,

would not be sufficient authority to warrant the Secretary of War in requiring changes to be made in the Bellaire Bridge, erected under the act of July 14, 1862, at the expense of the owner, without compensation. "The act of 1890," he said, "must be construed to apply only to such bridges as are constructed under the authority of an act of Congress, either the act of 1872 or under a special act, which expressly reserved to Congress the right to require changes or modifications in the structure." The same conclusion must be reached in regard to the act of March 3, 1899. So far, therefore, as the bridges here in question are concerned, this leaves section 18 of that act applicable only to those erected under the acts of December 17, 1872, and February 14, 1883.

As the Hannibal bridge was constructed under an act which expressly reserved the power to alter or amend it, in the interest of navigation, we are not concerned with the question of compensation, and section 18 of the act of March 3, 1899, is clearly applicable and adequate. I may add that the present Attorney General questions the correctness of the view expressed in the opinions referred to as to the necessity for compensation where the right to require alterations in a bridge authorized by Congress is not expressly reserved, and that that question is involved in another case now before this court, brought under section 18 of the act of March 3, 1899 (*United States v. Baltimore & Ohio Railroad Co.*, No. 670, October term, 1910).

United States v. Keokuk & H. Bridge Company (45 Fed., 178), upon which plaintiffs in error rely in support of their contention as to the inapplicability of section 18 of the act of March 3, 1899, to the Hannibal bridge, has been overruled by this court.

The principal point decided by the District Court for the Southern District of Iowa in *United States v. Keokuk & H. Bridge Company* (45 Fed., 178) was that Congress could not delegate to the Secretary of War the power to determine whether a bridge was an unreasonable obstruction to navigation, as provided in section 9 of the act of August 11, 1888. This view has been expressly overruled in *Union Bridge Company v. United States* (204 U. S., 364), which was later affirmed in *Monongahela Bridge Company v. United States* (216 U. S., 177, 194).

In the Keokuk Bridge case, District Judge Shiras attempted to limit the power of Congress, as exerted in section 9 of the act of August 11, 1888, to bridges *not* built under proper State or Federal authority. Thus, he said (45 Fed., 186, 187):

It is argued on behalf of the United States that parties undertaking to build bridges across navigable rivers do so at their peril, and, if a given bridge is in fact an obstruction to free navigation, the Secretary of War may be authorized to cause its removal, or require it to be so changed as not to prove an obstruction to navigation. *As to all bridges not built under proper State or Federal authority this may be true.* It may be admitted that the free navigation of a river is not to be interfered

with or obstructed by the building of a bridge over the same by any railroad or bridge company, or by any individual citizen acting without governmental authority; and therefore, as claimed, whoever undertakes, *without specific authority*, to erect a bridge over such a stream, does so at his peril, and if, when erected, it is in fact an obstruction, it may be removed for that reason. * * *

In the *Union Bridge* and the *Monongahela Bridge* cases this court sustained the application of section 18 of the act of March 3, 1899, to bridges constructed under the authority of the State of Pennsylvania across navigable waterways of the United States. There is certainly as much if not greater reason for applying that statute to bridges constructed under the authority of Congress, especially where the power to require the alteration of such bridges is expressly reserved.

The view expressed by District Judge Shiras—that the Congress could not so legislate except with respect to bridges *not* built under proper State or Federal authority—would deprive the statute in question of practically all efficacy, as but few bridges of any importance across the navigable waterways of the United States are constructed without governmental authority. It proceeds upon an erroneous impression as to the extent of the power of Congress and its authority to delegate to the Secretary of War the determination of matters of fact relating to the protection of the navigable waterways of the United

States from unreasonable obstructions, and is in conflict with the *Union Bridge Company* and *Monongahela Bridge Company* cases.

Even if it were held that section 18 of the act of March 3, 1899, does not apply to a bridge constructed pursuant to the act of July 25, 1866, the action of the Secretary of War in respect to the Hannibal Bridge and the proceedings in this case are none the less authorized and valid because the Hannibal Bridge was not constructed in accordance with the act of July 25, 1866.

Section 2 of the act of July 25, 1866, provides "that if any bridge built under this act shall be constructed as a drawbridge, the same shall be constructed as a pivot drawbridge with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw."

The report of Capt. C. W. Durham, of the United States Engineer Office at Rock Island, Ill., dated January 12, 1906, recommending the changes in the bridge that had been specified in the report of Maj. A. Mackenzie, stated (R., pp. 96, 102):

* * * Referring to the affidavit of T. M. Strain, civil engineer in charge of the Hannibal Bridge (p. 39), and to the accompanying maps (as to the correctness of which he testifies—Doc. 7), it would appear that the bridge is not a legal structure as regards clear width of draw span, due in part to riprap obstructions. Careful measurements on his profile show the following:

163.	Measurements.	East draw span.	West draw span.
		<i>Feet.</i>	<i>Feet.</i>
	Clear width at top.....	157. 5	157. 5
	Clear width at high water.....	156. 5	156. 5
	Clear width at stage 11.5.....	155. 5	155. 5
	Clear width at low water.....	151. 5	146. 5
	Clear width at 3 feet below low water. . .	140. 0	134. 0
	Clear width at 4½ feet below low water. . .	135. 0	132. 0

The law calls for a clear width of 160 feet, and it is fair to assume that this clear width should extend at least to low water, if not lower down. It is plain that the riprap rock thrown in around the piers diminishes the clear width at low stages. The affidavit of A. O. Cunningham, chief engineer of the Wabash Railway Co. (page 43), indicates that the bridge is an illegal structure, as according to his statement, the riprap comes up to 2.5 feet above low water, thereby materially diminishing the clear width at that stage; and the affidavit of Edward Shelah (pages 43 and 44), engineer maintenance of way of the Wabash Railway, has precisely the same effect.

The report of Maj. Riche to Brig. Gen. Mackenzie, Chief of Engineers, of January 13, 1906, in regard to the hearing accorded in the Hannibal Bridge matter, states (R., 111):

9. As taken from the drawings submitted by Mr. T. M. Strain on behalf of the bridge company, and sworn to by him as correct and true, and as substantially verified by this

office, the following are the *clear* openings on either side of the pivot pier:

At top of piers.....	east, 157.5 ft., west, 157.5 f.
At high water.....	" 156.5 " " 156.5
At 11.5-ft. stage.....	" 155.5 " " 155.5
At low water.....	" 151.5 " " 146.5
182 At 3 ft. below low water....	" 140.0 " " 134.0
At 4½ ft. below low water....	" 135.0 " " 132.0

10. The natural clear width of draw span opening at this bridge has been materially diminished by the deposit of masses of riprap about the piers. At low water the narrowing is 8½ feet in one channel and 13½ feet in the other; and at 4½ feet below low water (the specified depth of channel which Congress has already appropriated some \$11,000,000 to secure), one channel is narrowed 15 feet and the other 18 feet.

11. This is no mere technicality. This narrowing alone forms a serious obstruction to navigation, and when the damming effect on the river of this riprap is considered, it is clear that a great part of the present trouble at this bridge is directly caused by its failure to comply with the clearly expressed provisions of the act of Congress under which it is claimed to have been constructed.

The report of Maj. Riche was approved by the Chief of Engineers, Brig. Gen. McKenzie (R., 116).

In the report of the Judge Advocate General to the Secretary of War of May 15, 1906, upon the rehearing given the parties in interest in the matter of the Hannibal Bridge, that officer says (R., pp. 144-145):

It should also be borne in mind that the draw, which is required to be 160 feet in

width, in the clear, is in fact 157.5 feet wide at the top of the piers; 156.5 at high water; and 146.5 feet wide at low water (report of Major Riche, Jan. 13, 1906, p. 3). That this is not a mere technical irregularity will appear from the fact that, in a case arising under the same statute which authorized the construction of the Hannibal Bridge, it was held by the Supreme Court that a draw opening in the Kansas City Bridge of 153 feet in width, instead of 160 feet in the clear, gave the bridge the character of an unlawful structure. (*Hannibal and St. Joseph Railroad Company v. Missouri River Packet Company*, 125 U. S., 260.)

The report of the Judge Advocate General was approved by the Secretary of War (R., 147).

It thus appears, and was so found by the War Department, that the Hannibal Bridge was not constructed in accordance with the act of July 25, 1866. Plaintiffs in error, therefore, are in no position to take advantage of the fact, even if it should be so determined by the court, that section 18 of the act of March 3, 1899, does not apply to bridges constructed pursuant to the act of July 25, 1866. The bridge is none the less an unreasonable obstruction to navigation, and the proceedings in this case authorized by section 18 of the act of March 3, 1899.

See also the map offered by plaintiffs in error at page 284 of the record as to the dimensions of the draw span and the presence of riprap about

the piers, and the affidavits of A. O. Cunningham, chief engineer of the Wabash Railroad Company (R., 102), and Edward Shelah, engineer, maintenance of way, of the Wabash Railroad Company (R., 102), as to the presence of riprap about the piers.

Plaintiffs in error rely upon the general statements of officers of the War Department, manifestly mere assumptions, and clearly incompetent, that the bridge was constructed in accordance with the act of July 25, 1866. At the hearing accorded by the Secretary of War in this case this matter was expressly gone into, and it appears that it was found that the bridge was not constructed in accordance with that act.

In *Hannibal, &c., Railroad Company v. Missouri River Packet Company* (125 U. S., 260) this court, in holding that the Kansas City bridge, constructed under the same statute as the Hannibal bridge, was an illegal structure, because the draw opening was only 153 feet instead of 160 feet in the clear, said (pp. 269, 270):

We do not consider this sound reasoning. The statement that there is nothing whatever in the statute to show any intention on the part of Congress to reserve "160 feet of open space in the clear wholly unobstructed" is repelled by every provision in the act specifying the dimensions of the various parts of the structure.

* * * * *

The spans of the bridge are to be [not] less than 160 feet in length, *in the clear on each side of*

the pivot pier of the draw—that is, from the face of the central pier to the face of the next adjacent pier must be a distance of not less than 160 feet in the clear. Now, it is an elementary principle of mathematics that “the distance between two parallel planes is measured on a perpendicular to both.”

II.

The alterations specified in the notice served upon plaintiffs in error were set forth with sufficient particularity.

The proposed alterations are thus described in the notices referred to (R., 136):

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot pier to be cut down and converted into an east draw-rest pier; the present draw span to be moved west; new and solid long or protection piers, of cribwork, to be built above and below the new pivot pier; the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw openings on the new location of draw span to give at all stages of the river a clear width of waterway of not less than one hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of riprap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers.

It is not contended that what are manifestly the principal alterations specified—the alteration of the piers—were not sufficiently explicit. But it is contended that, as no dimensions for the protection piers of crib work directed to be built above and below the new pivot pier, and for the guard fences to be built along the Missouri shore, were prescribed, and it was not stated in what manner and of what material the guard fences should be built, plaintiffs in error were warranted in wholly disregarding the notice to alter, leaving it to the Government to ascertain in such manner as it could the reason why they failed to proceed.

An examination of the record discloses that plaintiffs in error were more familiar with the exact nature of the alterations than they are now willing to admit, and that their contentions are devoid of merit.

In the first place, attention is invited to a map prepared by the engineer of the Wabash Railroad, and which was offered at the trial by plaintiffs in error (Rec., 277), which purports to show the bridge in its proposed changed condition. It is the second map between pages 276 and 277 of the record.

Again, if the specifications were so vague as to make it impossible for the plaintiffs in error to proceed

intelligently to carry them into effect, it remains for them to explain how they were able to say to the Secretary of War, in urging a rehearing, that the changes involved "an estimated cost of \$160,000" (R., 139).

With respect to the proposed protection piers of cribwork to be built above and below the new pivot pier, it is manifest that they were to be duplicates merely of the protection piers which the report of the Government engineer shows extended above and below the old pivot pier (R., 83). There was, therefore, no room for doubt as to the meaning of this item of the proposed alterations.

As to the length and materials of the proposed guard fences along the Missouri shore, it appears from the report of Maj. Lusk, of the Engineer Corps, that such fences or sheer booms are possessed by "all other railway bridges crossing the Mississippi River between St. Paul and the mouth of the Missouri River" (R., 83). Moreover, the object of the fences seems to have been well understood by the president of the Wabash Railroad, who submitted a statement on his own behalf at one of the hearings. He said (R., 242-3):

I have made a careful personal investigation of the merits of this contention, being an engineer by education, I was interested in understanding the engineering problem involved. I recognize that there is room for an honest difference of opinion as to the best location for the draw-span and there seems to have been decided change of heart on the part

of engineers having to do with the Mississippi River, as to the best location of the draw span. The theory now seems to be that it is better to have the draw-span openings near one shore or the other, so that the shore side of the channel may be protected by a suitable "sheer-boom" "fence," thus enabling navigators to *feel* their way along if necessary, especially at night.

The guard fences were also discussed at the hearing (R., 166, 167, 155). From the general understanding of all parties interested, as to the object and purpose of these guard fences, it was certainly proper for the Government in the first instance to leave the length of the fences and the kind of material out of which they should be constructed to the discretion of the plaintiffs in error.

As above pointed out, these guard fences were common to bridges across the Mississippi in the vicinity of the Hannibal Bridge, and it is inconceivable that the plaintiffs in error would have experienced any great difficulty in constructing them had they really desired to comply with the notice to alter.

The notice in this case is very different from that in *United States v. Keokuk & H. Bridge Company* (45 Fed., 178), upon which plaintiffs in error rely. In that case the notice of the Secretary of War merely directed defendants "to so alter the said bridge as to render navigation through or under it free, easy, and unobstructed." In the present case the notice specifies the particular alterations required, and

plaintiffs in error are merely quibbling over minor details, as to which they should have asked further instructions if they did not care to exercise their own judgment concerning them, as the order permitted.

The alterations required in this case were specified as definitely as those in the case of the *Union Bridge Company*. The notice in that case required (204 U. S., 370)—

that the bridge in question be so altered as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second span from the Pittsburg shore to give a clear headroom over the Davis Island Pool of not less than 70 feet; and the first span from the same shore to give a headroom of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island Pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed.

As stated by the lower court in overruling the demurrer in this case (R., 43)—

this notice is of such a specific character that had there been any disposition on the part of the defendants to observe the directions of the Secretary of War, there would have been no trouble in obeying the order.

III.

The notice to alter, signed by the Assistant Secretary of War, met the requirements of section 18, of the act of March 3, 1899, which provides for notice by the Secretary of War, and there was therefore no variance between the information and the proof.

The notice to alter served upon plaintiffs in error, reads as follows (R., 128):

WAR DEPARTMENT,

Washington City, March 10, 1906.

To the Hannibal Bridge Company:

Take notice that:

Whereas, *The Secretary of War* has good reason to believe that the drawbridge, commonly known as the Wabash Railway bridge, owned or operated by The Hannibal Bridge Company, *inter alia*, across the Mississippi River at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi River (which is one of the navigable waterways of the United States) on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing riprap around the piers; there being difficulty in passing the draw openings or draw spans of such bridge by rafts, steamboats, or other water craft;

And whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy, and unobstructed, to wit:

(a) The west draw-rest pier (first pier from Missouri shore) to be converted into a pivot

pier; a new west draw-rest pier to be constructed near the Missouri shore; the present pivot pier to be cut down and converted into an east draw-rest pier; the present draw span to be moved west; new and solid long or protection piers, of cribwork, to be built above and below the new pivot pier; the existing cribs and crib piers to be removed, and proper guard fences to be built along the Missouri shore above and below the new shore pier.

(b) Each of the draw openings on the new location of draw span to give at all stages of the river a clear width of waterway of not less than one hundred and sixty (160) feet, available for boats drawing six (6) feet of water.

(c) The new and remodeled piers to be so constructed as not to necessitate the use of riprap or other protection around their bases, and as large a waterway as possible to be given between all new and remodeled piers;

And whereas, to March 15, 1907, is a reasonable time in which to alter the said bridge as described above;

Now, therefore, in obedience to, and by virtue of, section eighteen of an act of the Congress of the United States entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899 (30 Stat. L., 1153), *the Secretary of War* hereby notifies the said Hannibal Bridge Company to alter the said bridge as described above, and prescribes that

said alterations shall be made and completed on or before March 15, 1907.

(Signed) ROBERT SHAW OLIVER,
Assistant Secretary of War.

It will be observed that this notice states that the *Secretary of War* has good reason to believe that the bridge referred to is an unreasonable obstruction to navigation, and that therefore the *Secretary of War* notifies the company to alter it, etc. On its face, therefore, and in legal effect, the notice is given by the *Secretary of War*, the *Assistant Secretary*, who signed it, being merely the medium for its transmittal. In view of the amount of business devolved upon the *Secretary of War*, it is not to be supposed that Congress intended he should personally sign all such notices.

A case directly in point is *Miller v. Mayor of New York* (109 U. S., 385). In that case an act of Congress authorizing the construction of a bridge over East River expressly provided that "until the *Secretary of War* approve the plan and location of said bridge, and notify said company of the same in writing, the bridge shall not be built or commenced." The *Secretary of War* approved the plans of the bridge subject to certain conditions, and directed the *Chief of Engineers* to notify the company accordingly, which the latter did. Referring to the objection that the notice given by the *Chief of Engineers* was not sufficient, this court said (p. 394):

It is also objected that the notice given by the *Chief Engineer* to the company was not a

compliance with the requirement that notification should be given by the Secretary; but there is no force in the objection. When a Secretary of the Government is required to give information on any subject, he may act, and generally does act, through officers under him. He is not expected to make, over his own signature, all the communications required from the department of which he is the head. It would be impracticable for him to do so. The official communication is deemed made by him when it is made under his sanction and direction.

Similarly, it has been held that a reservation of public lands from sale, required by statute to be made by order of the President, is satisfied if made by the head of the appropriate executive department. (*Wilcox v. Jackson*, 13 Pet., 498; *Wolsey v. Chapman*, 101 U. S., 755, 769-770.)

In the absence of any proof to the contrary, it must be assumed that the statements contained in the notice were true and that the Assistant Secretary was authorized by the Secretary to send the same.

In *United States v. Peralta* (19 How., 343, 347), the court said:

We have frequently decided that "the public acts of public officers, purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified."

In *Parish v. United States* (100 U. S., 500), where it was held that the acts of the Assistant Surgeon General were the acts of the Surgeon General and had the same validity until countermanded or revoked, the court said (p. 504):

The office of Surgeon-General is one of the distinct or separate bureaus of the administrative service of the War Department. It has been found, in regard to many of these bureaus, and even to the heads of departments, that it is impossible for a single individual to perform in person all the duties imposed on him by his office. Hence statutes have been made creating the office of assistant secretaries for all the heads of departments.

It would be a very singular doctrine, and subversive of the purposes for which these latter offices were created, if their acts are to be held of no force until ratified by the principal secretary or head of department.

In *United States v. Adams*, 24 Fed., 348, 351, referring to the authority of the Assistant Secretary of the Treasury, the court said:

But I think that an act done by the assistant, and within the authority and power of the department, must, until the contrary appears, be presumed to have been done under the direction of the Secretary of the Treasury.

See, also, to the same effect, *The John Shillito Co. v. McClung*, 51 Fed., 868; *In re Huttman*, 70 Fed., 699; *Billings v. United States*, 23 C. C., 166, 167.

The act of March 5, 1890 (26 Stat., 17), providing an Assistant Secretary of War, authorizes him to "perform such duties in the Department of War as shall be prescribed by the Secretary or may be required by law."

The orders of Secretary Root, dated December 30, 1903, introduced by plaintiffs in error (Rec., 258-260), provide that "subject to the foregoing conditions and reservations, the jurisdiction of the Assistant Secretary of War will extend to the following military and civil matters: * * * 8. Business arising under the laws pertaining to the navigable waters of the United States."

One of the "foregoing conditions and reservations," upon which the plaintiffs in error placed much stress at the trial of this case, but which does not appear to be insisted upon in their brief, is that "the Secretary of War reserves for his final action all cases involving questions of policy arising under precedents or matters of extraordinary importance arising under the jurisdiction hereinafter set forth in the following classes of business."

It was contended in this connection that the action of Secretary Elkins, under date of January 17, 1893, in declining to make an order requiring the reconstruction or improvement of the Hannibal Bridge upon the facts then presented to him (Rec., 267) was a precedent within the meaning of the order referred to, which would prevent the Assistant Secretary from

acting in the present case, although thirteen years had elapsed, and he was acting upon the facts with respect to the bridge established by a new investigation and hearing.

It seems manifest that the action of Secretary Elkins was not to be regarded as a precedent for all time in respect to the Hannibal Bridge; furthermore, that it was necessarily the right and duty of the Assistant Secretary to interpret the order of Secretary Elkins in this respect, assuming that it was still to be regarded as in force, and that the correctness of his interpretation was a matter entirely between himself and the Secretary.

But it is nowhere shown on this record that the notice in question was not sent out with the knowledge and approval of the Secretary; nor that the Secretary ever disapproved it.

So far from disapproving the action of the Assistant Secretary in this matter, the Secretary of War expressly confirmed it. Upon application of plaintiffs in error (Rec., 139) the Secretary granted them another hearing, to be held before the Judge Advocate General (Rec., 146, et seq.). In his report upon this matter the Judge Advocate General recommended "that the action theretofore taken by the department should be adhered to" (Rec., 142, 147). The Secretary personally approved this report and directed that the "Chief of Engineers act accordingly" (Rec., 147). Immediately thereafter, the *Acting* Secretary

of War sent the following notice to the proper representative of each of the plaintiffs in error (Rec., 148):

WAR DEPARTMENT,
Washington, July 20, 1906.

SIR: In connection with previous correspondence on the subject, I beg to inform you that under date of July 14th instant, the Secretary of War approved the conclusions reached by the Judge Advocate General of the Army, as a result of the rehearing, to the effect that the previous action of the department ordering certain changes in the Hannibal Bridge across the Mississippi River at Hannibal, Mo., with a view to rendering navigation through or under it easy, free, and unobstructed, should stand, and action be taken accordingly.

Very respectfully,

ROBERT SHAW OLIVER,
Acting Secretary of War.

If there were any doubt on the subject, the ratification of the Secretary was equivalent to an original authority. (*United States v. Heinszen & Co.*, 206 U. S., 370, 382-384, and cases cited.)

The later notice confirmed the original notice. The only question that could possibly be made in respect thereto was as to the sufficiency of the time remaining to March 15, 1907, in which to make the alterations required. No question, however, was made in regard to this matter and no extension was ever asked for by the parties concerned. They simply chose to disregard entirely the action of the War Department.

IV.

The hearing accorded plaintiffs in error met the requirements of section 18 of the act of March 3, 1899.

Plaintiffs in error challenge the sufficiency of the hearing accorded them, on the ground that the Government did not produce and put under oath the witnesses upon whose testimony the Secretary of War would act in determining whether the alterations should be made, so that opportunity for cross-examination might have been had.

The record shows that plaintiffs in error were present at the hearing by counsel (R., 149-150), who read and filed a large number of affidavits against the proposed alterations (R., 150-151, 156, 201-218), and participated in the discussion of the matter (R., 157-169), to some extent cross-examining one of the Government engineer officers who testified (ib.). All the evidence in the Government's possession was laid before the meeting and was at the disposal of counsel (R., 140). Indeed, it appears that all the papers, together with the brief filed on behalf of the river interests, were turned over to counsel for plaintiffs in error for the purpose of enabling him to prepare his brief in opposition (R., 111). They were afforded every opportunity to present any evidence they desired to, and to contest any of the facts.

They made no objection at the hearing as to the manner in which it was conducted, and the course pursued by them in submitting their own evidence in the form of affidavits indicates very clearly that

they did not contemplate or expect a hearing conducted according to all the requirements of a judicial proceeding.

Having acquiesced not only in the manner of conducting the original hearing, but the rehearing as well, any objection by them at this time comes too late.

Moreover, this hearing seems to have been identical in all substantial respects with those in *Union Bridge Company v. United States* (204 U. S., 364, 369) and *Monongahela Bridge Company v. United States* (216 U. S., 177).

In the latter case, where the sufficiency of the hearing was expressly raised, the court said (216 U. S., 194):

It is urgently insisted that the defendant did not have such a hearing as it was entitled to have under the law on the question whether the bridge was in fact an unreasonable obstruction to navigation. This is a mistake. The bridge company had full notice of the action of the engineer officer, who, under the order of the Secretary of War, made a tentative examination of the facts, and it appeared at the regular, final hearing before that officer, with liberty to contest the facts and introduce any evidence pertinent to the case. It does not appear that it offered any evidence that was rejected. It was not subjected to any mode of procedure that interfered in any degree with a full and fair disclosure of the material facts. The engineer officer, after the hearing before him—the bridge company being represented at the hearing—found that

the bridge was an unreasonable obstruction to navigation. He reported to the Secretary of War all the facts that were adduced before him and which constituted the basis of his conclusion. And the decision of the Secretary was based on the facts so reported to him. That it must be assumed on this record. It does not appear that the Secretary disregarded the facts, or that he acted in an arbitrary manner, or that he pursued any method not contemplated by Congress.

Referring doubtless to the contention made in that case that the proceedings before the Secretary were not conclusive but were subject to reexamination in the courts, with the right of the defendants to trial by jury, the court said (216 U. S., 195):

* * * It was not for the jury to weigh the evidence and determine, according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, *and to prescribe the way in which the question of obstruction shall be determined.* Its action in the premises can

not be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that executive officers conform their action to the mode prescribed by Congress.

The ruling of the court that the matter was a legislative one is in accord with its decision in *Bridge Company v. United States* (105 U. S., 475), where Chief Justice Waite, delivering the opinion of the court, said (pp. 480-481):

* * * It is to be observed that the question now under consideration is not whether the bridge company has failed to comply with the requirements of the resolution, but whether those requirements are all that the due protection of free navigation demands. The first is undoubtedly a proper subject for judicial inquiry, but the last, as we think, belongs to the legislature. * * *

The crux of the matter lies in the fact that the inquiry as to whether a bridge is a reasonable obstruction to navigation is a legislative and not a judicial one. In a legislative inquiry the parties owning or controlling the bridge, if accorded a hearing, would not be entitled to trial by jury or to cross-examine witnesses, etc. The hearing directed to be given by the Secretary of War was undoubtedly intended to correspond to a hearing before a legislative committee and to avoid ex parte and arbitrary proceedings.

If the proceeding here in question were the exercise of the power of eminent domain, the party whose property is to be taken would doubtless be entitled to a hearing before "an impartial tribunal and the usual rights and privileges which attend judicial investigations," the question of compensation being a judicial and not a legislative matter. (Cooley's Const. Lim., sec. 564.) This court has decided, however, that the action of Congress in requiring the alteration of bridges across navigable waterways of the United States to meet the needs of navigation is not the exercise of the power of eminent domain but of police power, to the exercise of which uncompensated obedience is required. Thus, in *Union Bridge Company v. United States* (204 U. S., 364), after referring to *Gibson v. United States* (166 U. S., 269); *Scranton v. Wheeler* (179 U. S., 141); *New Orleans Gas Light Co. v. Drainage Commissioners* (197 U. S., 453); *C. B. & Q. R. R. Co. v. Drainage Commissioners* (200 U. S., 561); and *West Chicago Street Railroad v. Chicago* (201 U. S., 506), the court said (p. 399):

Do the principles announced in the above cases require us to hold, in the present case, that the making of the alterations of its bridge specified in the order of the Secretary of War will be a taking of the property of the bridge company for public use? We think not. Unless there be a taking, within the meaning of the Constitution, no obligation arises upon the United States to make compensation for the cost to be incurred in making such alterations. The damage that will accrue

to the bridge company, as the result of compliance with the Secretary's order, must, in such case, be deemed incidental to the exercise by the Government of its power to regulate commerce among the States, which includes, as we have seen, the power to secure free navigation upon the waterways of the United States against unreasonable obstructions.

In *The Japanese Immigrant Case* (189 U. S., 86), where it was held that the immigrant acts "do not necessarily exclude opportunity to the immigrant to be heard, when such opportunity is of right," the court said (pp. 100-101):

* * * It was held in *Murray's Lessee v. Hoboken Land & Improvement Co.* (18 How., 272, 280, 281, 283), that "though 'due process of law' generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some course of judicial proceedings, yet this is not universally true;" and that "though, generally, both public and private wrong are redressed through judicial action, there are more summary extrajudicial remedies for both." Hence, it was decided in that case to be consistent with due process of law for Congress to provide summary means to compel revenue officers—and in case of default, their sureties—to pay such balances of the public money as might be in their hands. * * * But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fun-

damental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—*not necessarily an opportunity upon a regular, set occasion, and not according to the forms of judicial procedure*, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.

So, as to the opportunity to be heard required to be afforded the owners of property in matters of taxation (Cooley's Const. Lim., sec. 496; note: *Spencer v. Merchant*, 125 U. S., 345; *Hibben v. Smith*, 191 U. S., 310), the proceeding is not required to be judicial in character, but merely such as to give the interested parties an opportunity to present their objections to the imposition of the tax. (Cooley on Taxation, 3d ed., p. 59; *King v. Mullins*, 171 U. S., 429.)

But, as stated, the parties to this proceeding are not in a position to question the sufficiency of the hearing in this case, in the respects to which they refer, because they not only acquiesced but participated in the procedure followed without any objection whatsoever.

V.

The record in this case shows that the proceedings with respect to the Hannibal bridge were free from anything suggestive of arbitrary action on the part of the War Department. A full and fair hearing was accorded plaintiffs in error in the first instance, and further opportunity to overcome the case made against them on the rehearing before the Judge Advocate General, which was reviewed by the Secretary of War personally. The inquiries conducted by the Department and the testimony adduced at the hearing show that the Hannibal bridge has long been regarded by the engineer officers of the Government and by persons navigating the river as a dangerous obstruction—in fact, the most dangerous bridge on the Mississippi River. The alterations required are not unreasonable, and the expense involved not excessive.

The judgment of the District Court should therefore be affirmed.

Respectfully submitted.

WILLIAM R. HARR,
Assistant Attorney General.

MARCH, 1911.